This report includes a confidential annex.

Folkestone
Hythe & Romney Marsh
Shepway District Council
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Report Number **C/17/76**

To:	**Cabinet**
Date:	**31 January 2018**
Status:	**Key Decision**
Chief Executive:	**Alistair Stewart**
Cabinet Member:	**Cllr David Monk, Leader of the Council/ Cllr Dick Pascoe, Property Management and Environmental Health**

SUBJECT: DELIVERING OTTERPOOL PARK – LANDOWNER UPDATE

SUMMARY:

This report provides an update to Cabinet on a range of matters relating to the delivery of Otterpool Park. It sets out various options for delivering the council's objectives for Otterpool Park and also makes recommendations that the council should explore, including the option of forming a development company. It also provides an update on the budget for the project.

REASONS FOR RECOMMENDATIONS:

Cabinet is asked to agree the recommendations set out below because:

a) The council needs to have a method of delivering its aspirations for Otterpool Park. It is necessary to decide in principle on the favoured option so that further work can be undertaken to finalise the structure.
b) The council should also consider whether to pursue the option of a development company for other sites.
c) The recommendations below have resource and financial implications for the Council.

RECOMMENDATIONS:

1. **That report C /17/76 be received and noted.**
2. **That the definition of commercial return set out in paragraph 2.3 be approved.**
3. **That the corporate joint venture option be agreed in principle as the vehicle for delivering the Otterpool Park garden town, with a further report**

to be submitted to Cabinet on the joint venture and potential for a development company.

4. That the Head of Strategic Development Projects be authorised to seek financial, commercial and legal advice on the formation and operation of a joint venture company for Otterpool Park and investigation into a council controlled development company, and a sum of up to £350,000 to be included in the capital programme for this Item of expenditure to be approved by Council.
5. That the existing Collaboration Agreement be extended to March 2019.
6. That the Head of Strategic Development Projects be authorised, in consultation with the Leader of the Council, to continue to liaise with the Homes England (HE formerly known as Homes and Communities Agency) regarding its role in Otterpool Park, with any updates requiring a decision on this matter brought back to Cabinet in due course (the confidential annex to this report refers).
7. That the council agrees in principle to using its compulsory purchase powers if necessary to assemble land.

1. Background

1.1 The Cabinet last received an update on the council's position as joint landowner and promoter of Otterpool Park on 19 July 2017. The report (C/17/25) updated Cabinet on a range of matters including the masterplan work, progress on land acquisition and liaison with Department for International Trade. It sought approval to include costs of land acquisition in the capital programme. At that meeting Cabinet resolved (minute 25):

"1. That report C/17/29 be received and noted.

2. That the following principles for the development of the Otterpool Park Framework Masterplan be approved to provide a basis for a submission to the Local Planning Authority to support the Core Strategy Local Plan Review and also a basis for preparing an outline planning application:

a) The indicative layout set out in the spatial plan (Appendix A) showing broad location for development, strategic landscaping, housing, and employment and community facilities, subject to responding to comments from the recent community engagement events.

b) A review of the total number of homes in line with feedback from public events and viability advice.

The Otterpool Park Framework Masterplan will then be refined for final agreement by a future Cabinet meeting.

3. That the Head of Strategic Development Projects be authorised, in consultation with the Leader of Council, to enter into a second collaboration agreement with Cozumel Estates.

4. That ongoing liaison with DIT over Otterpool Park as a pilot in the promotion of garden towns to international investors be approved, and delegate authority be given to the Corporate Director Strategic Development to make a submission of further information to DIT, upon consultation with the Leader.

5. That SDC's attendance at MIPIM Cannes in 2018 be endorsed and for officers to work on the detail with Locate in Kent and potentially also with DIT on this event.

6. That the budget requirement for land acquisition and the need to build in the sums set out in paragraphs 1.2 and 1.3 of the confidential annexe into the capital programme £75k for 17/18; £600k for 18/19 and £3 million for 19/20 to fund the costs of taking the land options be noted."

1.2 This report sets out the current position, and the council's objective in broad terms. It sets out options available to the council (and its partners) to enable the delivery of the project and the achievement of its objectives. It also provides a budget update, and an update on land acquisition (in the confidential annex).

1.3 In September 2016 the Council and Cozumel entered into an initial promotion/collaboration type agreement. This agreement envisages that the parties collaborate in assembling the site, securing planning permission and then entering into further agreements relating to the development of the site. As far as the landownership is concerned the council is a major landowner and has, or is in the process of negotiating, options to purchase further land. Its landowner partner, Cozumel Estates Ltd owns or controls the majority of the rest of the land in this area and another major party is seeking to acquire further land in the area. A table in the confidential annex shows the current position. Negotiations on some sites have been protracted, and it may be that the council will have to consider using its compulsory purchase powers. Accordingly agreement in principle is sought by Cabinet if necessary to use these powers. The decision to use CPO would be subject to a separate and detailed report.

2. The council's objectives and "commercial return"

2.1 The council's objectives in broad terms are set out in its corporate plan. One of the priorities under the "More Homes" strategic objective is to "Create a new garden town at Otterpool Park". Whilst the council wishes to see the development progress has it also other priorities under the "Achieving Stability" strategic objective. Several priorities are relevant here – namely those that state "Explore alternative income streams including commercial opportunities", "Develop an investment strategy for the longer term benefit of the district" and "Optimise the financial benefit from major developments in the shorter and medium term".

2.2 With these corporate objectives as a starting point, a paper has been prepared by the Corporate Director – Organisational Change to set out strategic financial objectives for Otterpool Park. The paper itself is attached as Appendix 1, and the principles themselves are set out below:

- To commit to a long term involvement with the garden town to explore means of generating ongoing revenue streams from commercial, retail and residential elements of the development.
- To recognise the capital input and to release this value to ensure any borrowing costs are sustainable within the financial parameters of the council.
- To optimise the resources from the garden town to provide a financial benefit for the whole district.
- To work towards an ongoing financially sustainable model for the new town and to avoid, as far as possible, creating unfunded liabilities.
- To work with private sector and public sector partners to maximise external funding in support of the project.

- To consider at each critical decision point the future financial model with an emphasis on affordability for the council.

2.3 To ensure Otterpool Park will meet this financial imperative the project must be tested at every stage for its financial viability. Major development projects will always need significant upfront investment in planning and construction, but the council must ensure in the longer term that the project is profitable. To do this, the council must agree with its partner Cozumel its definition of acceptable commercial return, i.e. the approach to profit and the minimum threshold necessary for taking Otterpool Park forward. Cabinet approval is sought for a working definition of commercial return as “the value or profit available after meeting all the requirements of the initial outline planning application and future reserved matter approvals and further planning permissions”. Each partner can then chose how it spends its share of this profit, which, in the case of the council, may involve providing additional facilities and services for Otterpool Park; reinvesting in Shepway’s wider community; supporting the council to deliver existing services or a mixture of all of these. It is important to bear in mind that the council’s motive is not profit per se; it has no shareholders, all the money that arises from its involvement in Otterpool Park will be used one way or the other for the public benefit.

3. Possible Delivery Methods

3.1 It is considered appropriate now to consider the options available to the council (and its partners) to enable the delivery of the project and the achievement of its objectives. In making this decision it should be appreciated that the development of Otterpool Park is unlike any other project the council has embarked on in terms of size, complexity and time. The development is likely to take over thirty years and so will span several electoral cycles (both national and local) and several economic cycles. Accordingly the traditional ways that the council delivers projects either through its direct workforce or essentially simple contracts are unlikely to be appropriate. This report considers the various options. This part of the report has been formed by advice from Pinsent Mason solicitors and Arcadis consultants. The council has also liaised with Basingstoke and Deane Borough Council and Hampshire County Council, to learn from their experience of planning and delivering Manydown new community, on land jointly owned by the councils. Manydown is also a government designated garden town.

3.2 The various advantages and disadvantages are set out below and these are assessed against the council’s objectives. There are legal and financial issues which will be set out in greater detail in a future report if members wish to pursue the options recommended. It should be noted that there is no delivery method that is prescribed or favoured by the government for garden towns. It is for the council and its partners to determine the structure. Also, the government is currently consulting on Locally Led Development Corporations. In its consultation response the council has welcomed the move toward local leadership, but given the council and its landowner partner already have control of the land this option is not one that needs to be actively pursued for Otterpool Park.

3.3 There are several possible variants but the key possible structures are described below. These are:-

- The council and other land owners each develop out their own parcels of land within the site;
- The council develops out the site by entering into a sale and purchase agreement to buy Cozumel's land interest (and possibly the interests of other parties);
- The council does not develop but sells its land interest to another party free of conditions and development obligations;
- The council sells its land interest to another party subject to a development agreement;
- The council sells its land interest by means of a conditional land sale agreement with an ability to re-acquire land in the event of failure to meet milestones;
- A contractual joint venture agreement;
- A corporate joint venture vehicle – either limited liability company (limited by shares) or a limited liability partnership.

The council and other land owners each develop out their own parcels of land within the site

3.4 Under this basic option the council obtains planning permission (either for the site under the terms of the collaboration agreement or failing this unilaterally for the parts of the site that it owns) and then develops out those parts of the site that it owns.

3.5 It would be important to ensure that the planning permission obtained and any related planning agreement is structured so as to enable independent development by each land owner separate of the other.

3.6 The council could carry out the development itself or employ a development manager to develop out in accordance with the terms of a development management agreement.

3.7 The council might choose to build itself or act as a master developer and procure the construction of enabling works (i.e. infrastructure etc.) and then sell off parcels to housebuilders/third party developers thereby mitigating development risk and cost.

3.8 An extension of the above is that Cozumel or other land owners could each retain their own land interests but appoint the same development manager in respect of their parts of the site to endeavour to procure a "joined up" approach to development or possibly entering into further forms of collaboration agreement in relation to specific parts of the site.

The council develops the site by entering into a sale and purchase agreement to buy Cozumel's land interest (and possibly the interests of other parties)

3.9 In order to achieve a unified approach and certainty of development the council could seek to develop the site (or a majority of the site) by buying Cozumel's interest (and possibly other land owner's interest) in the site.

3.10 The purchase of land could be conditional on agreeing a master plan and obtaining a satisfactory planning permission for the site. The land might be sold at a fixed price or subject to overage. It may be that the sale and purchase of parcels would be made subject to other conditions such as viability, availability of funding, pre-lets etc.

3.11 The council having acquired sufficient parts of the site might either develop itself or enter into a development management agreement and procure development of parcels by third parties as outlined above. Where it develops itself it would need to determine whether to do so in its own name or set up some form of vehicle.

The council does not develop but sells its land interest to another party free of conditions and development obligations

3.12 The council simply sells its interest in the site to a third party or to Cozumel who then develops out the site.

3.13 If required by the council, a sale could be structured to be conditional on securing a planning permission satisfactory to the council (as landowner) or the purchaser (or both parties) and with obligations to pay clawback or overage possibly once planning permission is obtained and / or once development is completed (to capture uplifts in value).

3.14 It could be advantageous for the council to obtain planning permission for the site before a sale, although the permission would not run with the land[1] the fact that planning permission had been granted would give the purchaser considerable comfort that similar permission would be granted. This would help de-risk the site and also help steer the nature of development and create an immediate uplift in value before sale.

The council sells its land interest to another party subject to a development agreement

3.15 The council could sell its land interest to a third party, subject to covenants by the purchaser to obtain a satisfactory planning permission (if not already

[1] Regulation 9 of the Town and Country Planning Act General Regs 1992 states that planning permission will not run with the land when the council grants permission to itself.

obtained) and then develop the site within agreed parameters pursuant to a development agreement.

3.16 The agreement might be structured such that the third party could only draw down phases of land as and when a satisfactory full planning permission is obtained for each phase and once a phase is drawn down there would be requirements to develop within certain timeframes. The council would have the ability to exercise influence over the progress and quality of the development via the incorporation of control mechanisms in the development agreement (e.g. development obligations, approval of planning application/design/method statements etc.). The council would however have to ensure that the control it has over the development is not such as to bring the European procurement rules in to play, which would impact on value.

Council sells its land interest by means of a conditional land sale agreement with an ability to re-acquire land in the event of failure to meet milestones

3.17 Rather than sell its land through a development agreement, the council could enter into a conditional land sale agreement, whereby the purchaser acquires the land interests in the site (by way of freehold purchase or long lease) from the council by way of a conditional purchase contract, in return for a land price with profit share/overage. The council would have limited control in the delivery of the development through approval rights of the planning application, and inclusion of various milestones with ability for the council to terminate if milestones are not met. No positive build obligations would be imposed on the purchaser, to avoid any risk of it being caught by the public procurement rules. Development is in essence incentivised through the ability of the council to buy back the site in the event of development failure or breach of the terms of the agreement at a pre agreed price (possibly at a discount to market value).

A contractual joint venture agreement

3.18 The council and Cozumel could enter into a purely contractual joint venture agreement or collaboration agreement to document how they will work together to bring forward the development of the site, setting out in particular the parties' respective contributions to the arrangement (whether land contributions, funding and/or resourcing) and the parties' entitlement to returns. No separate legal entity would be created.

A corporate joint venture vehicle – either limited liability company (limited by shares) ("Ltd") or a limited liability partnership ("LLP")

3.19 A corporate joint venture vehicle would be created that is jointly owned by each of the council and Cozumel (usually on a 50/50 basis) which will in turn procure a developer for the development of the site. Other land owners could also participate and own a share of the vehicle. A possible potential delivery structure based on this model is appended (Appendix 2 - it should be noted that if Kent County Council's bid to the Housing Infrastructure Fund is successful a separate but related governance structure will need to be put in place that incorporates KCC's role as accountable body).

3.20 The vehicle could either be a limited liability company (limited by shares) or limited liability partnership. The corporate vehicle would own the site as each party would contribute their land assets to the vehicle plus any cash to enable it to take forward development activities. Any profits would be distributed to the partners proportionately to the relative investments of each party in the vehicle. The pros and cons of these two alternatives can be considered further at the next stage of work.

4. Which delivery method would be most appropriate?

4.1 There are various advantages and disadvantages to the various options described above. The options should be judged against the council's objectives and priorities described in section 3 of this report. To summarise, these are to ensure a high quality garden town is developed and the council achieves financially the best possible advantage.

The council and other land owners each develop out their own parcels of land within the Site

4.2 The principal advantages are:-

- Straightforward legal process;
- The council will control part of the development directly;
- The council will benefit from all profits / uplift in land values.

4.3 The main disadvantages are:-

- There is no guarantee that other parties will develop their sites or when development will occur. There would be no control over development of the sites of other parties except through the planning process. This would mean the council would not have control of the delivery of aspects of the site that are not on its land but where it has an ambition to deliver, eg employment. This may also affect the ability to apply for public funds for infrastructure in these locations, including the current bid of £281 million to the government's Housing Infrastructure Fund.

- There would be no joined up approach to seeking planning permission and development of the site - as a result the development may be fragmented with no overall masterplan; any cohesion of the proposed garden town could be lost. This would create significant planning complications, and would be likely to cause delay to delivery.

- No economies of scale in delivering roads and infrastructure etc. would be obtained, nor in the set-up costs of delivering each parcel across the site. If the council began development first, it may need to make significant infrastructure investment itself upfront. Delivery would likely be slowed down rather than speeded up.

- It is hard to envisage how infrastructure would be funded. S106 negotiations are likely to be longer and very complex to negotiate which parties will fund what and when. In the case of Chilmington Green, Ashford this has taken many years to agree. The council cannot covenant with itself in relation to a planning agreement and therefore would need to work around this issue, possibly involving KCC as enforcing authority.

- The council would need to take on development risk and the administration and cost of procuring development, which could be considerable and would require significant up-front investment of funds and staff resource.

- There would be no equalisation of costs and profits over the wider site (unless a collaboration agreement was entered into) and adjoining owners could benefit from land value uplift (i.e. due to the council's works) without contributing to costs.

- If the land is developed mainly for commercial purposes then the council may need to set up a company to do so which can be costly and time consuming.

4.4 It is unlikely that this option would deliver a properly planned garden town. In addition the council would be exposed to significant risks if it sought to develop. The project, or part of it, itself. It does not, at present have the skills to do so and to try to undertake a project of this scale would be beyond its capabilities. There may, however be merit in setting up a council controlled development company and this is discussed more fully in section 7 below.

4.5 In addition this option would not be guaranteed to make the council the best financial return. As stated above there may be no economies of scale so increasing the council's costs. Furthermore adjoining land owners could benefit from the council's expenditure without a return to the council. Whilst facilitating development can be one of the roles of the council it should also expect, in appropriate circumstances, to see a return for the council tax and rate payers.

The Council develops out the site by entering into a sale and purchase agreement to buy Cozumel's land interest (and possibly the interests of other parties)

4.6 The principal advantages are the same as those in the first option described above:-

- Straightforward legal process;

- The council will control the development directly;

- The council will benefit from all profits / uplift in land values.

4.7 The disadvantages are:-

- The council may not be able to buy the land from third parties;
- If it could buy the land it would have to finance the purchases;
- The council would take on significant development risks;
- The council has entered into a collaboration agreement with Cozumel – altering its stance now, though legally possible, would go against the spirit of the collaboration agreement and willingness of the parties to work together;
- If the land is developed mainly for commercial purposes then the council may need to set up a company to do so which can be costly and time consuming.

4.8 This option relies on the ability of the council to agree and finance the purchase of further areas of land. If either are not possible the project would be in jeopardy and the council's ability to see a garden town constructed in doubt.

4.9 The council will take on significant risks – even greater than the option described above. The comments on the council's ability to do this are equally valid, if not more so, for this option.

4.10 The uncertainties surrounding this option therefore do not tend to suggest that this would be a viable way for the council to achieve its objectives.

The Council does not develop but sells its land interest to another party free of conditions and development obligations

4.11 The principal advantages are:-

- Once terms of sale are agreed it would be a quick process
- Cheap and relatively risk free
- Overage/clawback will enable the council to share in planning gain and or super profits in the event of success of the scheme. This will also help ensure "best consideration" is achieved.
- The purchaser of the council's interest would be left to get on with development. It would therefore be a relatively simple commercial structure enabling the purchaser to develop without future constraints.
- Sale to an experienced developer may help maximise the chance of successful development.

4.12 The main disadvantages are:-

- There would be no certainty of delivery or timing of development or the creation of a planned garden town. The council's control over the development would be limited to its planning powers.

- The site may never be developed.

- There would be no direct control of the ultimate identity of parties developing the site or purchasing parts of the site.

- Advice to the council suggests that it would be very difficult to attract a single developer or investor to a site of this scale due to the scale of risk. Developers would usually look for a joint venture arrangement whereby costs and risk can be shared, or for outright purchase of smaller plots that can be developed in the short to medium term. The value of the site at this point in the process would therefore be comparatively low.

- The council is not an investor and therefore will not make profits in the same way as if it were an investor in development.

- No certainty that the Council will sell the land for "best consideration" and therefore this may not be compliant with S123 Local Government Act 1972.

4.13 This option carries less risk than the others but probably will mean that the council does not achieve its corporate objectives in its corporate plan of creating a new garden town at Otterpool Park. The council will receive land value, however once sold the timing of the development would be out of the council's control – the purchaser could merely "land bank" the site and develop it when and if it saw fit. The council's control over the form of the development will, as noted above, be limited to it planning powers and the opportunity to influence the development therefore restricted.

4.14 The council may have to accept a significantly reduced land value for the site and would forego the chance of making profits which would not appear to be the most financially advantageous way of proceeding.

The Council sells its land interest to another party subject to a development agreement

4.15 The principal advantages are:-

- Development agreements are reasonably well understood by the market.

- The council can impose direct controls on the nature and timing and delivery of the development of the site that can be enforced by the council

- If development is achieved through sale of phases of development to the developer then the Council is able to retain some control over development and may be able to structure development so that phases are not sold to the developer until the phase is ready for immediate development.

- The inclusion of an overage/profit share mechanism can give the council a share in the success of the scheme, which will help ensure "best consideration" is achieved.

- The council mitigates risk by passing over the obligation to develop to the developer and the administration/call on resources is significantly reduced.

- A development agreement is a flexible contractual arrangement which may be adapted to suit the intentions of the contracting parties e.g. it can cater for a phased handover of land.

4.16 The disadvantages are:-

- The council would have less control over the planning and development process and will need to comply with the requirements imposed on it in the development agreement.

- Depending on how the agreement is structured the European procurement rules could apply.

- Any sale of the council's interest in the site is likely to be discounted as a result of the development agreement obligations.

- Unless the sale is to Cozumel then the issues around securing a unified approach to development remain.

- A third party developer may not wish to acquire other parts of the site that the council would have been willing to acquire and develop for the benefit of the whole scheme.

- What in practice would happen if there is a significant breach of the development agreement? Are remedies available likely to be enforced or would in reality development just stall?

4.17 The council's experience with the town centre redevelopment showed the limitations of this approach where the form of the town centre shopping centre as built, differed significantly from the one that was the subject of the development agreement. This was because market conditions changed and both parties had to accept major variations to the final form of the centre. This risk would be magnified in the case of a development of the size and complexity of Otterpool Park where the economic and commercial fate of the developer may change significantly over the long development period due to recession, takeovers etc. Furthermore the value of the council's land will, as noted above be discounted because of the development agreement.

4.18 It is not considered therefore that this option would enable the council to achieve its objectives.

Council sells its land interest by means of a conditional land sale agreement with an ability to re-acquire land in the event of failure to meet milestones

4.19 The advantages of this approach are:-

- Conditional sale agreements are reasonably well understood by the market.
- The council can impose direct controls on the nature and timing and delivery of the development of the site. These controls can be enforced by the council.
- If development is achieved through sale of phases of development to the developer then the council is able to retain some control over development and may be able to structure development so that phases are not sold to the developer until the phase is ready for immediate development.
- The inclusion of an overage/profit share mechanism can give the council a share in the success of the scheme, which will help ensure "best consideration" is achieved.
- The council mitigates risk by passing over the obligation to develop to the developer and the administration/call on resources is significantly reduced.
- A conditional sale agreement is a flexible contractual arrangement which may be adapted to suit the intentions of the contracting parties e.g. it can cater for a phased handover of land.
- Reduced procurement risk provided the contract is structured correctly so that no OJEU process is required as to selection of the developer/ purchaser.

4.20 The disadvantages are:-

- Conditional land sale agreements seek to incentivise development though negative obligations so that if milestones are not achieved (i.e. commencing development by an agreed date or failing to build out etc.), then the land that has been transferred by the council is re-acquired. Such agreement cannot contain the same level of detailed positive obligations as a normal development agreement.
- Often a conditional land sale agreement will only allow termination very many years after initial commencement of development. Accordingly, the land may be "sterilised" for a number of years with little or no development before the council can re-acquire the land.
- If the developer fails to perform its duties would the council in practice have the funds to be able to buy back the land acquired by the developer?

4.21 In addition to the disadvantages above for the previous option, fundamentally this option could leave the land lying fallow for some time. The obligations would be negative in nature which would make the development of a planned settlement that much more difficult. If the developer fails to perform its obligations the council would have to find the monies to buy the land back; with the continuing squeeze on public finances this could be difficult. In the worst case the council could see the land idle with no means to reacquire it. Would such a conditional arrangement depress the price of the land in the first place too?

A contractual joint venture agreement

4.22 The advantages are:-

- It is a flexible contractual arrangement which may be adapted to suit the intentions of the contracting parties. There is the potential to "create" a board of representatives similar to a company.

- Both parties share the costs and the risk in accordance with their respective interests which could be 50/50.

- This option may be more beneficial from a tax perspective to a corporate vehicle, as there would be no land transfers and no payment of stamp duty land tax.

- There would be joint control over delivery of development, which may be more attractive to parties.

- It avoids expense and administration of having to set up corporate vehicles.

4.23 The disadvantages are:-

- The Council has less control over the planning and development process and will need to comply with the requirements imposed on them in the collaboration agreement. The decision-making process would reflect the parties' respective interests.

- Likely to be complex procurement process.

- Complex and detailed contractual arrangements are necessary to manage the unincorporated association and determine when consent of the other party or parties is required. In practice this arrangement would be very difficult to document and would end up having to be tantamount to a collaboration agreement.

- Unlimited liability for participants (in that the parties will be required to contract in their own right).

- As stated above in practice rather than give control to both parties, the joint contractual arrangement would result in each party having to consent to every major step of development which would significantly raise the risk of dispute and possibly devalue their land interests (until development is complete).

- The unincorporated association cannot own land, contract with third parties, employ individuals, etc. The parties would have to undertake this in their own name.

- There is less flexibility to raise finance. Financing is likely to be complex and require cross guarantees[2].

- It is possible that such a contractual arrangement may be deemed as a partnership (resulting in joint and several liabilities for the parties).

- It can be administratively onerous and expensive when participants join or exit.

- It creates a less transparent profit sharing arrangement than a limited liability partnership or a limited company if the property is held by one of the parties, although there would normally be open book obligations on the party holding the land interests.

4.24 This is a complex arrangement and over a thirty year period it would be difficult, it is considered, to sustain. The robustness of the model is not sufficient for it to be an appropriate vehicle to ensure the development is carried out. In addition there is a risk that the arrangement would devalue the land holdings of the parties.

A corporate joint venture vehicle – either limited liability company (limited by shares) ("Ltd") or a limited liability partnership ("LLP")

4.25 The advantages are:-

- Both the council and Cozumel share the costs and the risk in accordance with their respective interests which could be 50/50.

- There will be joint control over delivery of development and a flexible constitution. This can be tailored to suit the requirements of the parties and is flexible enough to adapt to changes in internal and external circumstances.

- A company shares structure has the advantage that the liability of a shareholder is limited to the amount which remains unpaid on their shares (if any). The consideration for their shares may be a nominal amount (for instance £1).

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[2] A cross guarantee is a guarantee from each member in a group of companies of the obligation(s) of each other member of the group. It is designed to protect the person taking the guarantee from a situation where assets are moved out of the company that has incurred the liability (usually a loan) and are transferred to group companies putting them beyond reach of the lender if the borrower defaults. If the lender has a cross guarantee, it will be able to recover the money from whichever company in the group has the most assets (and the least debt).

- LLP structure has the advantage also of limiting liability to the amount contributed.

- A company constitutes a separate legal entity. It is independent of its shareholders and can therefore hold property, employ personnel and enter into contracts. Changes in its shareholding do not affect its existence or the status of its contracts (subject to change of control provisions).

- Where either party proposes to exit, this could be effected by a simple share transfer with the property interests remaining in the company, as assets are not required to be transferred on the exit or joining of a shareholder.

- Two basic tiers of involvement at board and member level/shareholder level can be set up, with each tier being capable of further sub-division providing flexibility and scope for accommodating stakeholders and other participants.

- Creates a transparent profit sharing arrangement as both parties have sight of accounts and the day to day management of the company.

- Directors have defined duties to the company to ensure probity in dealings.

- This structure provides considerable flexibility to raise finance through the creation of different types of share and loan capital.

- Dividends are revenue income and will directly benefit the GF

- A company can also create a floating charge over its assets which may assist with raising external finance.

- Unlike other partnerships, an LLP may also create loan capital and security, e.g. floating charges (due to it being a corporate body). This structure provides flexibility to raise finance.

- In the case of a company there is the ability to pay dividends as a means of distributing any profit. This allows more predictable draw down of payments than the more unpredictable profile of costs and income from some of the other options.

- Companies are tried and tested models for local authority participation.

4.26 The disadvantages are:-

- Depending on ownership percentages the council may lose control over development as well as ownership of its land interest.

- The council loses direct control over the land but retains significant influence through the company or limited liability partnership.

- The company entity creates a lack of tax transparency as there is an intermediate tax layer as the company is itself assessed for tax. This may not be tax effective for the Council (as local authority's income is not taxed in a tax transparent vehicle).

- Directors' duties may be viewed as onerous and can, in limited circumstances, lead to personal liability for breach.

- A company is less flexible than LLPs in terms of management and finances.

- Time consuming and expensive to set up joint venture vehicle and administer. Requires agreement of Cozumel.

- Likely to be complex procurement process.

4.27 Whilst there are technical disadvantages with this option it would appear to be the most suitable to carry through the development and achieve the council's objectives. It will enable a joint and comprehensive approach to taken to the development ensuring an equitable distribution of profits. It provides a robust structure which is likely to be able to able to endure through the period of the development, and be flexible enough to react to changes in circumstance and parties.

4.28 Whether the corporate joint venture is a limited company or a limited liability partnership would have to be subject to further detailed advice.

5. What is the best option?

5.1 As stated above the options open to the council need to be judged against its objectives which, again in broad terms are to secure the development of a garden town and to obtain the best possible outcome financially for the council.

5.2 Whilst the options all have their advantages and disadvantages it is considered that the corporate joint venture option represents the best way to achieve the objectives.

5.3 In brief:-

- It offers a flexible structure able to adapt to changing circumstances over the period of the development. Options such as a development agreement would be inflexible;

- Changes in parties can be accommodated;

- It enables a comprehensive approach to the development, but still allows SDC to retain and develop specific areas of the site if it so choses;

- Profit share is transparent and equitable;

- There are financial advantages (see above); in particular that the council will continue to see revenue funding over many years as opposed to a one off capital receipt: and

- It is a tested method for delivering a development, familiar to those who would bid to develop the site. Developers and investors are more likely to support this option, and the market will expect this approach for large scale projects such as this. The reason for this is that developers prefer to share risk and reward for large projects, and in the main do not have long term financial planning or capital that allows them to buy such sites outright. It also brings shared skills, expertise and borrowing capacity, recognising that large and complex projects need a range of investment and delivery partners to work together to be delivered successfully.

Role of the council and degree of control

5.4 With a JV option, the council will retain representation and involvement in decision making as a partner over the long term, so long as it wishes to remain in the partnership or until the development is complete. It would be represented on the JV proportionately to its investment (land and other assets including funds). In setting up the JV, Council Members will be responsible, jointly with the other partners, for setting out:

- Vision for the project;

- Quality of design and placemaking;

- Business plan; and

- Shareholder agreement (this will protect the shareholders' investment in the company; establish a fair relationship between the shareholders and govern how the company is run including decision-making arrangements).

5.5 Cozumel has been consulted on this report and they too favour the corporate joint venture approach.

5.6 In order to facilitate further discussions with Cozumel on this it is recommended that the current Collaboration Agreement be extended by a year to March 2019.

6. Next steps for delivery of Otterpool Park

6.1 If members agree that the corporate joint venture option is the one to pursue then further detailed financial, commercial and legal advice, including state aid, must be sought before the council commits itself to entering into such an arrangement. The decisions sought by this report do not commit the council to the formation of a joint venture company merely that in principle it is the option to pursue.

6.2 Tenders will be sought for the advice. The estimated cost of legal, financial and commercial advice (specifically to the council, not the collaboration board) is up to £350,000. This figure is based on estimated costs for:

- Legal advice: to include consideration of alternative forms of entity; governance arrangements; funding mechanisms; procurement; contractual terms of the entity and future Development Agreements an strategic planning legal advice; stamp duty; legality/ powers to act; due diligence; (est up to £180,000).
- Financial advice to include: VAT, Corporation tax and SDLT; borrowing/ treasury; financial legal; financial modelling; independent review; loan agreements (est up to £100,000).
- Commercial and delivery: viability assessment; soft market testing; outline business case preparation (est up to £70,000).

6.3 It is recommended that this advice is provided, so cabinet approval is sought for up to £350,000 funding for this purpose.

7. A council development company?

7.1 One of the possibilities canvassed above was for the council to develop the land itself. Although not seen as viable for a project of the scale of Otterpool Park it is considered that for more contained projects, perhaps even parts of Otterpool Park itself, the council should consider exploring the options of forming a development company itself.

7.2 Again detailed advice will have to be sought but it is considered that it would be advantageous to seek advice on this at the same time as seeking advice on the joint venture company. This will avoid two tendering processes and some of the issues involved will be the same.

8. Financial update and implications

8.1 Cabinet approved funding in June 2016 for planning of Otterpool Park on both the landowner and LPA sides. The estimate for the cost of this work to December 2019, that is to the point at which the Core Strategy Local Plan has been adopted and outline planning permission determined is:

LPA	£903,800
SDC Landowner	£2,726,900
TOTAL	£3,630,700

The costs of funding this can be met from existing base budget provision (approximately £400,000) and the Otterpool Reserve (£3,200,000) which has been set aside to meet the total costs of activities to the point of the determination of outline planning permission. It should be noted that the costs of delivering the Garden Town, whichever of the options is decided upon, will be subject to a separate financial modelling exercise.

8.2 As a next step Cozumel and the council, and any other future landowners, will need to commit further funds for the project up to the point at which a joint venture (JV) is set up in 2018/2019 (should Cabinet support this as a preferred option). These costs are likely to include:

- Procuring a development partner;
- JV set up costs;
- Preparing reserved matters planning applications;
- Further legal and financial advice; and
- Business planning.

8.3 A detailed report on the viability of the project, long term return to the council and likely future costs will be brought to Cabinet in the spring, following completion of viability work undertaken by Montagu Evans for the Collaboration Board, and Savills for the council.

8.4 Some funds will also be required to support the development of a bid to the government's Housing Infrastructure Fund (HIF), should Kent County Council's Expression of Interest, in partnership with Shepway District Council, be successful[3]. The cost of this preparatory work has been included within the bid, so should not incur a net loss to the councils.

9. MIPIM Cannes

9.1 As noted above one of the resolutions at the cabinet meeting of 19 July 2017 was to endorse SDC's attendance at MIPIM in Cannes (minute 25 .5). As the Department for International Trade is attending MIPIM it will be able to promote Otterpool Park on the council's behalf, so it has subsequently been decided that the council will not attend MIPIM on this occasion.

10. Risk Management Issues

10.1 A summary of the perceived risks are as follows:

3 KCC submitted a bid for £281M to the HIF in Sept 2017 for early delivery of a range of infrastructure for Otterpool Park.

Perceived risk	Seriousness	Likelihood	Preventative action
Unforeseen costs mean project or scale of project is unviable	High	Medium	Early assessment of key costs. Reduce scale and/or secure public sector subsidy.
Failure to extend Collaboration Agreement	High	Medium	Work closely with Cozumel Estates Ltd to understand its position; timely commissioning of legal support.
Cost of £350,000 is not adequate for advice necessary	Medium	Medium	Careful consideration of level of advice needed now rather than later. Share cost of advice wherever possible with landowner partner where it relates to both parties.
Market viability	Medium	Medium	Anticipate fluctuations in market and maximize potential in good times. Do not over provide in infrastructure and make sure the market can support the numbers of units built in each phase.
Failure to agree the most appropriate delivery model with landowner partner(s)	High	Medium	Continue dialogue to ensure objectives of all parties are understood.

10.2 As far as the delivery options are concerned the council is being asked to agree in principle to a particular option, there is no commitment to enter into any binding commitment. All of the options outlined have inherent risks, so these will need to be fully explored and set out in the report on the details of the options.

11. Legal and Financial Comments

11.1 Legal Officer's Comments (Nicola Everden)

This report has been prepared in conjunction with legal and also external legal advice from Pinsent Masons. The legal team will continue to provide advice and where necessary obtain specialist legal advice as the project progresses.

11.2 Finance Officer's Comments (Tim Madden)

The financial implications at this stage are set out within the report. It is important to note that the viability work referred to in the report being carried out by Montagu Evans and Savills will provide an estimate of the future financial return to the council. This is a critical piece of work, as it will inform future decisions on timing, up-front investment and strategic decisions as to how the council wishes to optimise the value out of the development. It will also enable the council to develop its longer term strategies as to how to best utilise the resources deriving from Otterpool Park. The definition of acceptable commercial return, set out in paragraph 2.3, represents a reasonable financial parameter for this stage of the development.

The report itself identifies a sum of £350,000 to commission the appropriate professional advice for the most appropriate vehicle for taking the development forward. As this represents the project moving into a delivery phase, it is feasible to fund this expenditure through borrowing as it is of capital in nature. Technical guidance is being sought in order to fully define the required arrangements however for this work approval is sought to fund this through borrowing and to include this in the capital programme.

12. Diversities and Equalities Implications

This report does not raise any specific diversities and equalities implications.

13. Contact Officer and Background Documents

Councillors with any questions arising out of this report should contact the following officers prior to the meeting:

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Andy Jarrett – Head of Strategic Development Projects, andy.jarrett@shepway.gov.uk, 01303 853

Background documents

Appendices

Appendix 1 – Otterpool Park Strategic Financial Objectives

Appendix 2 – Potential Delivery Structure – contractual joint venture