

This Report will be made public on 12 October 2021

Report Number **C/21/41**

To: Cabinet
Date: 20 October 2021
Status: Non key
Responsible Officer: Ewan Green, Director of Place
Cabinet Member: David Monk, Leader of the Council

SUBJECT: VARIATION TO THE MEMBERS' AGREEMENT FOR OTTERPOOL PARK LIMITED LLP

SUMMARY: The report sets out proposals for minor amendments to the Members' Agreement for Otterpool Park LLP, including in relation to the appropriate levels of delegations under the Members' Agreement and other agreements to enable the project to proceed efficiently.

REASONS FOR RECOMMENDATIONS

The recommendations are required to facilitate efficient operation and delivery of the Otterpool project. Certain amendments are proposed to the Members' Agreement to enable land transfer via the proposed Strategic Land Agreement. The report also sets out delegated powers under the Members' Agreement and related ancillary agreements.

RECOMMENDATIONS:

- 1. To receive and note report C/21/41.**
- 2. To approve the proposed amendments to the Members' Agreement described in appendices 1 and 2 of this report.**
- 3. To delegate the various powers of the Council as shown in Appendix 1 and paragraphs 4.2 and 4.3.**
- 4. To delegate authority to the Director of Place, in consultation with the Assistant Director (Governance and Law), to finalise the drafting of the form of varied Members' Agreement (including where necessary further non-material consequential amendments related to the proposed Strategic Land Agreement and other ancillary project documentation also being finalised).**
- 5. To approve the entering into of a Deed of Variation to the Members' Agreement by the Council, the Delivery Vehicle and the Nominee Company.**

1. BACKGROUND

- 1.1 The Cabinet on 27 May 2020 approved the Members' Agreement establishing Otterpool Park LLP (the LLP) (minute 6). The Agreement was later varied – see the Cabinet's meeting of 20 January 2021, minute 75.
- 1.2 The Members' Agreement describes in the delegations matrix the "Consent Matters", these are decisions that the LLP cannot take and must be made by the Council. This report sets out the proposed levels of delegation within the Council to deal with the various Consent Matters. In addition it also suggests certain other delegations outside the Consent Matters.
- 1.3 This report also sets out certain proposals to amend the Members' Agreement in the light of experience and the need to take account of the provisions of the Strategic Land Agreement (and other ancillary documentation) that is being finalised (see Cabinet 20 January 2021, report C/20/69, minute 75 on the Strategic Land Agreement).
- 1.4 The proposed amendments outlined above are set out in detail in the report appendices.

2. RATIONALE FOR THE PROPOSALS

- 2.1 In setting up the LLP the intention, in basic terms, was to give the LLP the freedom to act to deliver the Council's objectives. However the Council must be assured that its objectives are being met and that the money it is investing in the LLP is being properly spent and that, in accordance with projections, a return will be delivered to the Council so that it can spend the returns for the benefit of the wider district. The suggested delegations seek to achieve this balance between allowing the LLP to act in a commercial environment and the Council's need to ensure its interests and money are safeguarded.
- 2.2 In assessing the proposals it is important to set out the present position of the Council Vis – a – Vis the LLP.
- 2.3 The Council ultimately has complete control of the project, e.g.:
 - the Council and the LLP will be parties to the Strategic Land Agreement with the LLP taking on most of the responsibility for delivery of the project;
 - the Council and Otterpool Park Development Company Ltd (OPDC) are the members of the LLP; and
 - the Council is the sole shareholder of OPDC.
- 2.4 The powers in the Members' Agreement are heavily weighted in favour of the Council, including (without limitation):
 - the Council has the right to appoint 6 nominees to the board of the LLP (Board); Nominee Company has the right to only appoint 1 nominee;
 - the quorum for a valid meeting of the Board is 2 Council nominees (i.e. there doesn't need to be any representation from the Nominee Company in order for a valid decision of the LLP to be made);

- resolutions of the Board need to be unanimous;
- the business plan of the LLP is updated each year and sent for approval to the Council;
- any “material” amendment to the business plan of the LLP needs the approval of the Council; and
- the Council effectively has sole control regarding how much of the net profit generated by the LLP is reinvested into the LLP, reserved for working capital or paid to the members of the LLP.

3. PROPOSED AMENDMENTS TO THE MEMBERS’ AGREEMENT

3.1 Appendix 1 sets out in **bold** the proposed amendments to the delegations matrix with suggested deletions shown struck through. The delegation level proposed are shown in **bold italics** and these are dealt with in the next section. It should be noted that it is not intended that the delegation levels be actually incorporated into the agreement. The LLP is referred to in the appendix as “the Delivery Vehicle”. It should be noted that the left hand column (i.e. with the numbers) does not appear in the original delegations matrix within the Members’ Agreement, the rows are numbered for the purpose of this report for ease of reference. References to a “row” below are therefore a reference to that row within the delegations matrix. It should be noted that the Board will also be able to delegate its own approvals.

3.2 Turning first to the suggested additions:-

- Row No 1. The word “material” is added to the wording of the first matter in the column; this is to bring it into line with paragraph 1 of the matrix which refers to “material” amendments and also to ensure that the LLP does not have to seek the Council’s consent to any non-material matters; and
- Rows 5 and 22 – the addition of the reference to the Strategic Land Agreement is to make it plain that land transactions in accordance with the Agreement do not need any approvals under these provisions.

3.3 Addressing the proposed deletions:-

- Consent Matter 13 – reference to auditors is removed so as to bring it into line with row 11 which makes the approval of auditors a Board decision;
- Row 20 – the reference to a “Concept Design” is proposed to be deleted, it is not defined anywhere in the document and in any event was shown to be a decision of the Board;
- Row 22 – in accordance with the rationale that the LLP should be able to manage its own affairs in accordance with the Business Plan reference to the approval of the appointment of a Development Manager is to be deleted;

- Row 38 – it is suggested that this “catch all” delegation is too wide and could lead to confusion as to what is and is not within the LLP’s authority – it is suggested it is deleted; and
- Row 40 – again in accordance with the rationale that the LLP should be able to manage its own affairs it is suggested that the LLP should be able to determine its own policies given that it has to act within the terms of the Approved Business Plan.

3.4 As mentioned the Strategic Land Agreement is being finalised. As part of the Agreement the LLP will produce what is called a Phased Delivery Strategy to demonstrate that a phase of the project (including any sub-phases encompassed within it) can be delivered in accordance with the Business Plan. It will deal with matters including (but not limited to) funding arrangements, infrastructure requirements (if appropriate) and land arrangements. Accordingly the Members’ Agreement needs to be amended to describe the mechanism for the approval of Phase Delivery Strategies. These proposed changes are detailed in Appendix 2 (reference paragraph 13, page 25 of the appendix).

4. DELEGATIONS – HOW WILL THE COUNCIL EXERCISE ITS APPROVALS

4.1 Appendix 1 shows in ***bold italics*** proposals for how the Council would exercise its approvals in relation to relevant matters the delegations matrix and sub - paragraph 17.3 in the body of the Members’ Agreement. The purpose of the suggestions is to place the delegations at the appropriate level within the Council, with major decisions the prerogative of members, and operational decisions the prerogative of officers.

4.2 In addition it is suggested that the Director of Place be authorised to approve the Phased Delivery Strategies and any amendments thereto recommended by the Board (including consideration of the strategy at the Otterpool Park LLP Members’ meetings). The Phased Delivery Strategies, as mentioned above, require to demonstrate whether a phase (and any sub-phases encompassed within it) is deliverable in accordance with the Business Plan.

4.3 Finally it is suggested that the Leader of the Council be authorised to act as the Council’s representative at the Members’ (Owners’) meetings for the LLP and as the Council’s shareholder representative in meetings of the Otterpool Park Development Company Limited, on the proviso that these delegations should not conflict with nor override the ones set out in Appendix 1.

5. RISK MANAGEMENT ISSUES

5.1 The key considerations in relation to risk are identified below:

Perceived risk	Seriousness	Likelihood	Preventative action
Project delivery milestones impacted by approval process	High	Low	Council Delegations / approval processes and Members' Agreement in place and reviewed periodically to ensure they support delivery of the project.

6. LEGAL/FINANCIAL AND OTHER CONTROLS/POLICY MATTERS

6.1 Legal Officer's Comments (NM)

Any amendments to the Members' Agreement will need to be by way of a deed of variation as stated in the report. It is anticipated that external legal assistance from Browne Jacobson will be sought in this regard with assistance from the legal services team as and where required.

6.2 Finance Officer's Comments (CI)

There are no financial implications arising directly from this report.

6.3 Diversities and Equalities Implications (GE)

There are no diversity or equalities implications arising directly from this report.

6.4 Climate Change Implications (AT/HS)

As this report deals entirely with administrative matters, there is no climate change impact.

7. CONTACT OFFICERS AND BACKGROUND DOCUMENTS

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

Ewan Green, Director of Place
Telephone: 07783659864
Email: ewan.green@folkestone-hythe.gov.uk

The following background documents have been relied upon in the preparation of this report:

Appendices:

Appendix 1 Otterpool Park LLP Members' Agreement Delegations Matrix

Appendix 2 Otterpool Park LLP Members Agreement - Proposed
Amendments