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| Item No. 20. | Classification: Open | Date: 19 July 2016 | Meeting Name: Cabinet |
| Report title: | | Disposal of Council's Freehold Interest at 99-161 Ilderton Road SE16 3JZ | |
| Ward(s) or groups affected: | | Livesey | |
| Cabinet Member: | | Councillor Mark Williams, Regeneration and New Homes | |

FOREWORD - COUNCILLOR MARK WILLIAMS, CABINET MEMBER FOR REGENERATION AND NEW HOMES

As part of our work to invest in and regenerate the Old Kent Road we must use all tools at the council's disposal to build homes of all kinds that our residents so desperately need. This is in addition to the new jobs, parks, schools, and transport improvements that we will deliver. We are currently consulting on the Old Kent Road Area Action Plan and a consultation with residents and local businesses will take place over the next three months. This report sets out how we will use our freehold interest at 99-161 Ilderton Road to build new homes, including 35% affordable housing, on what is currently a storage area for old trucks.

RECOMMENDATIONS

1. That the cabinet agrees to grant an option to acquire the council's freehold interest in land at 99-161 Ilderton Road (as shown hatched black in Appendix 1) to CB Southberm 2 Limited (CB) for residential development in accordance with the terms set out in the closed cabinet report.
2. That the cabinet authorise the Head of Property to negotiate the option agreement and subsequent development agreement with CB.

BACKGROUND INFORMATION

3. The council is the freeholder of land at 99-161 Ilderton Road SE16 over which a long leasehold was granted for a peppercorn rent to RS Joyner & Son Limited (Joyner). There are approximately 95 years left on the lease.
4. Joyner is also the freeholder of land adjoining the subject (as shown cross-hatched black in Appendix 1) and the two sites together are proposed to be developed.
5. CB Southberm 2 Limited (CB), a developer, has agreed terms with Joyner to buy out their head leasehold and freehold interests and to enter into an option agreement to purchase the council's freehold interest.
6. No planning application has yet been made but the council will require the developer to build out and complete a planning policy compliant scheme of 35% affordable homes by putting a restrictive covenant on the land.

7. The land is currently used as a commercial vehicle sales yard and is in a Preferred Industrial Location, however, this area was designated a Housing Zone by the GLA in February 2015.
8. The council has prepared a draft Area Action Plan for the Old Kent Road area which includes this site and allows residential and mixed use proposals.

KEY ISSUES FOR CONSIDERATION

9. Negotiations have taken place between CB and the council's property officers regarding the sale of the council's freehold interest in the land. The council wishes to support planning policy by requiring that the developers build out a fully planning compliant scheme providing 35% affordable and that no subsequent viability assessment can change this. It is intended to secure this obligation by placing a restrictive covenant upon the land.
10. The option period will be for 18 months and require the developer to apply for planning permission. The council will receive a non-returnable option payment to secure the agreement and require the developer to pay a land value to reflect the value of the council's reversionary freehold interest when the option agreement is exercised. The option sum will not be deducted from the principle land payment.
11. The developer must have previously or simultaneously with the council option agreement, acquired ownership of the Joyner land so that the council is able to ensure that the one developer is able to deliver the scheme despite the interests being split. The option agreement will not be assignable.

Policy implications

12. The ultimate disposal of the council's interest will generate a capital receipt that can be used by the council to further its key strategic objectives.
13. The ability to impose restrictions on the land title to ensure that planning requirements on social housing are complied with will mean greater certainty that the council's policies are implemented.

Community impact statement

14. The impact of the proposed development on the local community will be slight but positive. The current use as commercial vehicle sales is an eyesore and its redevelopment will improve the visual amenity of the area and provide much needed private and affordable housing.
15. The council will receive market value for its freehold interest which can be spent upon council priorities.
16. There are no direct negative implications of the report's recommendations on the Council's Managing Diversity and Equal Opportunities Policy.

SUPPLEMENTARY ADVICE FROM OTHER OFFICERS

Director of Law and Democracy

17. Section 1, Localism Act 2011 provides councils with a general power of

competence whereby a local authority has the power to do anything that individuals generally may do. However, this power does not enable a local authority to do anything which it is unable to do by virtue of a pre-commencement limitation. Section 123, Local Government Act 1972 is a pre-commencement statute which imposes restrictions on a council's power to dispose of land.

18. Section 123, provides that a council shall not dispose of land under the section (unless it is by way of a short tenancy) for a consideration which is less than the best that can reasonably be obtained except with the consent with the Secretary of State.
19. Paragraph 10 of the report confirms that the developer will pay a consideration to reflect the value of the council's reversionary interest. Paragraph 12 of the closed report confirms that this will represent best consideration.
20. The report also comments on the importance of ensuring that the scheme is planning policy compliant providing 35% affordable housing. This is complicated by the fact that the site is currently within a Preferred Industrial Location although this will be reconsidered as the draft Old Kent Road Area Action Plan emerges. A further complication is development plan policy (London Plan Policy 3.12) supported by the National Planning Policy Framework allows the affordable housing contribution in a scheme to be reduced where viability appraisals suggest this is justified.
21. Whilst a requirement to this effect will be included in the sale agreement, this will not necessarily be effective against a successor in title of the purchaser. CB Southbern 2 Limited is a relatively newly formed company and it will be necessary to bind not simply the purchaser but also the land being disposed of for the covenant to be enforceable against future purchasers.
22. The law relating to restrictive covenants whilst long-standing, is rather complex and has been the subject of much litigation since introduced in 1925. In order to be able to enforce such a covenant against future owners, it is essential to ensure that the covenant is genuinely restrictive; it must be properly registered with the Land Registry; and it must be capable of benefiting land retained by the original covenantee. Accordingly, to be effective the covenant must be in terms that it benefits particular parcels of land in the vicinity of the site where ownership is held by the London Borough of Southwark. The relevant land is shown hatched black in the plan attached at Appendix 1.
23. Cabinet should be aware that the legislation allows the possibility of a restrictive covenant being modified or even discharged. The process for this is set out under section 84, Law of Property Act 1925 and it involves an application to the Upper Tribunal (Lands Chamber). When considering an application to modify or discharge, the Upper Tribunal must be satisfied that the restriction is contrary to the public interest. Assuming the council's existing affordable housing policy is endorsed within the New Southwark Plan, then it is difficult to see that an argument for discharge would be sustainable. However, it should be noted that section 84(1B)) requires the Tribunal to take into account the development plan – and this will include not only the Southwark Local Plan but also any adopted Area Action Plan for the Old Kent Road area, and the London Plan.

Strategic Director of Finance and Governance (FC16/010)

24. The report is requesting Cabinet to grant an option to acquire the council's freehold interest in land at 99-161 Ilderton Road (as shown hatched black in Appendix 1) to CB Southberm 2 Limited (CB) for residential development and to authorise the head of property to negotiate the option agreement and subsequent development agreement with CB. Terms of the agreement and the financial implications are detailed in the closed version of the report.
25. The strategic director of finance and governance notes the head of property considers the proposed transaction as set out in the closed version of the report to represent best consideration in terms of S123 of the Local Government Act 1972.
26. The capital receipts generated from the proposed arrangement will be recycled into the council's capital receipts funds in financing council priorities.

BACKGROUND DOCUMENTS

| Background Papers | Held At | Contact |
|-------------------|---------|---------|
| None | | |

APPENDICES

| No | Title |
|------------|---|
| Appendix 1 | Site plan showing the overall development site edged black with the council's freehold hatched black and Joyner's freehold cross-hatched black. |

AUDIT TRAIL

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| Cabinet Member | Councillor Mark Williams. Regeneration and New Homes | |
| Lead Officer | Eleanor Kelly, Chief Executive | |
| Report Author | Marcus Mayne, Principal Surveyor | |
| Version | Final | |
| Dated | 7 July 2016 | |
| Key Decision? | Yes | |
| CONSULTATION WITH OTHER OFFICERS / DIRECTORATES / CABINET MEMBER | | |
| | Officer Title | Comments Sought |
| | Director of Law and Democracy | Yes |
| | Strategic Director of Finance and Governance | Yes |
| | Cabinet Member | Yes |
| | Date final report sent to Constitutional Team | 7 July 2016 |