

Executive

21 January 2020

Legal: –

1. Further legal implications in respect of Options 2, 3 and 4 are set out below:

Option 2 - the Council builds St George's Field MSCP and disposes of 17-21 Piccadilly and Castle Mills with a restricted use of residential and a requirement to build the new Foss bridge

Commercial/Contractual - Procurement

2. The comments in respect of the procurement of a contractor in respect of the development of a MSCP at St George's Field in paragraphs 77-79 in the main body of the report apply similarly to this option.
3. In addition, given the council would be seeking to dispose of 17-21 Piccadilly and Castle Mills with restrictions placed on the developer, this could invoke the PCRs. Whether or not the PCRs would apply would depend on the degree to which the council sought to impose restrictions.

Commercial/Contractual - Powers, Structure and Governance

4. See paragraphs 80 – 83 in the main body of the report

Property

5. The comments in respect of the diversion of the YW sewer and the demolition of public toilet block at St George's Field site as per those in the main body of the report for option 1 apply in relation to construction of MSCP.
6. In addition to receiving payment of a purchase price upon transfer of the Castle Mills site and/or the 17-21 Piccadilly site, the council could seek to require payment of additional monies subsequently as 'overage' (profit share) when the developer disposes of completed apartments (but this

would probably reduce the amount which the developer is willing to pay at the point when the land is transferred to them).

7. Whilst a restrictive covenant prohibiting development and use of the Castle Mills and 17-21 Piccadilly sites other than for residential purposes would bind the buyer and future owners/successors in title:
 - a. it would not oblige the buyer to build anything on the land within any particular timescale (so the buyer might landbank the site(s) and not develop /regenerate the site(s) for some time)
 - b. the buyer or future owner of the site(s) could potentially obtain the release or modification/relaxation of such a covenant by applying to the First Tier Tribunal (under section 84 of the Law of Property Act 1925) if they persuade the FTT that the covenant prohibits a reasonable use of the land or serves no useful purpose.
 - c. the imposing of such a restrictive is likely to reduce the capital receipt that the council receives for selling these sites.

8. Although the council could impose a positive covenant/contractual obligation on the buyer of the Castle Mills site to build a bridge:
 - a. the 'burden' of positive covenants in freehold transfer deeds does not automatically 'run with the land'. Therefore if the initial buyer sells the land without having built the bridge, the council could not enforce the covenant against the new owner (though it could seek to sue the original buyer) unless the new owner had given a direct covenant to the council by signing a deed of covenant in favour of the council when it bought the land (which is possible but is a cumbersome process)
 - b. positive covenants within a lease (unlike those in a freehold transfer deed) are automatically binding upon the original tenant's successors in title but a lease (rather than freehold ownership) is unlikely to be attractive/acceptable to developers
 - c. if the covenant is breached, the council may not be able to persuade a court to grant an injunction forcing the buyer/future owner to build the bridge (instead the court may only order the defaulting party to pay some monetary damages to the council)

- d. any buyer of the Castle Mills site may seek to insist that any obligation on it to commence construction of the bridge is only triggered when construction/disposal of apartments on the Castle Mills site has reached a particular stage/threshold (which would be at their discretion)
 - e. is likely to reduce the capital receipt obtained for disposal of the Castle Mills site
9. The comments at option one in the main body of the report in respect of possible approval from the Secretary of State for Transport for construction of a new bridge also apply to option two.
10. A Section 38 Agreement (as provided for in section 38 of the Highways Act 1980) between the Council as Highways Authority and developer may be required regarding the dedication/adoption of the bridge as highway/public right of way.

Option three - do not proceed with St George's Field MSCP, close Castle Car Park, and dispose of 17-21 Piccadilly and Castle Mills with a restricted use of residential and a requirement to build the new Foss bridge

Commercial/Contractual

11. The comments in respect of option two, above, also apply to option three.

Property

12. With the exception of the comments in respect of the MSCP, the comments in respect of option two, above, also apply to option three.

Option four - do not implement the masterplan and sell 17-21 Piccadilly and Castle Mills without any restrictions

Commercial/Contractual

13. A straightforward disposal of land is not subject to the Public Contracts Regulations 2015 and so there would be no requirement to carry out a procurement process if the sites were disposed of without imposing any restrictions.

Property

14. If the Council disposes of 17-21 Piccadilly and Castle Mills sites without any restrictions limiting future development or use (or any obligations requiring particular development within any timescale) then the capital sum received for those sites should be maximised but the buyer(s) will be able to build whatever they consider appropriate on the sites (subject to obtaining planning permission) or landbank the sites without carrying out any development/regeneration on the sites unless and until the buyer wishes to do so.
15. The Council's only ability to control development of those sites would be limited to exercise of its statutory functions and powers as local planning authority.

List of Abbreviations Used in this Annex

FTT - First Tier Tribunal

MSCP – multi-storey car park

PCRs – Public Contracts Regulations 2015