

Report of the Corporate Director of Economy and Place

**Application to Vary a Restrictive Covenant at 3-4 Patrick Pool, York**

**Summary**

1. This report sets out details of an application received by the owners of 3-4 Patrick Pool, to vary a restrictive covenant on a currently vacant retail property in the city centre. The property was previously owned by the Council but was sold by the Council in 2007.

**Recommendation**

2. The Executive Member is asked to agree to vary the restrictive covenant which was imposed when the property was sold so that the property can be used as a public house use detailed within this report, in exchange for a one-off consideration of £25,000.

Reason: To provide the Council with a one off consideration in exchange for agreeing to a variation of the covenant.

**Background**

3. 3-4 Patrick Pool was sold by the Council on 27 April 2007. On sale the Council imposed a restrictive covenant prohibiting use of the property as a sex shop or public house. The Council has been approached by the owners of 3-4 Patrick Pool who want the Council to vary the covenant so that the property can be used as a public house.
4. Whilst the property is currently vacant, it has been used most recently as a hairdressers. There are two privately owned flats at upper floor level. The owners of the property are intending to use the ground floor space as a restaurant/cafe and drinking establishment.

5. The Council owns the property adjacent to 3-4 Patrick Pool and which is known as Pump Court. Pump Court is a service yard which provides access to a number of privately owned adjacent premises as well as the council owned Kings Court, which is let to various office based occupiers. A location plan of the property is attached as annex 1 of this report. The owners of 3-4 Patrick Pool have rights over Pump Court for the purposes of storing bins, bicycles and have an emergency right of access. These rights will not be affected by the proposal.
6. The owner of 3-4 Patrick Pool recently applied for planning permission in respect of the property to allow them to use it for a restaurant/ cafe and drinking establishment. Planning consent was granted on 28 April 2016. The planning officer's report commented that;

*“The character of Patrick Pool is as a short, transitional street used to access the market rather than of a street which has a strong retail presence. There is a delicatessen (A1), a sandwich shop (A1), a hardware shop (A1), Pivni (A4) and a financial services use (A2). Within this context, it is considered that a more flexible approach in assessing this change of use proposal is considered appropriate”.*

7. A Premises Licence allowing the sale of alcohol on the property was granted permission on 27 February 2017 following a hearing of the Council's Licensing Sub Committee. The Council's licensing team advise that this Premises Licence is granted having regard to the City Centre Special Policy Statement which sets out supplementary guidance to the council's Statement of Licensing Policy within certain areas of the city centre. Patrick Pool sits within one of three city centre areas identified, given it is included within the Back Swinegate/ Fossgate area. These areas, known as the Cumulative Impact Zone (CiZ) have been identified as areas being under stress because of the cumulative effect of the number of premises being concerned in the sale and/or consumption of alcohol which has led to serious problems of disorder and/or public nuisance affecting residents, visitors and other businesses. Within the CiZ there are 243 on licences (bars, restaurants etc) and 26 off licences.
8. Having been granted planning under reference 16/00494FUL (see Annex 2), along with the granting of the Premises Licence the owner can only use the premises as a drinking establishment if the covenant restricting the use of a public house is lifted. Whilst the

Council no longer owns the property, the restrictive covenant reserved to the Council at the time of the sale will need to be lifted and hence this is now what the owners seek of the Council.

9. The planning permission contains conditions which serve to protect the amenity of surrounding residents and businesses by controlling most notably;
  - the hours of business to Mondays to Sundays – 08.00 – 23.00 hours
  - restricting delivery vehicles and waste removal vehicles to Mondays to Fridays – 08.00 to 18.00 hours; Saturdays 09.00 – 13.00 hours and none on Sundays and Bank Holidays.
  - All electronically amplified music emitted from the premises shall be restricted to background music only and shall not be audible at the nearest noise sensitive facade.
10. The owners could apply to the Lands Tribunal to have the covenant lifted and argue that the lifting of the covenant would not cause any detriment to the Council and hence there should be no monetary value attached to the releasing of such. There is a possibility the Tribunal could take this view particularly as planning has already been granted.
11. An application to the Tribunal can be time consuming and as the owner wishes to sell its interest to a new owner for use as a cafe/ public house, it has offered the Council a consideration of £25,000 in exchange for the agreeing to vary the restrictive covenant to allow the property to be used as a public house now.
12. The precedent of receiving a consideration in return for removing restrictive covenants granted in favour of the council has been illustrated historically elsewhere in the city. Restrictive covenants in favour of the council have been released for example at Clifton Moor, albeit for a different use proposal, enabling residential use from a previous office use.

## **Options**

13. If the proposal is not accepted then the applicant could:
  - a) Decide not to proceed with their proposal and re-market the property for an alternative use within the confines of the restrictive covenant.

- b) Potentially take the matter to the Lands Tribunal. Legal Services has indicated there maybe a reasonable chance of success that the applicant would be able to remove the covenant (but the outcome would be difficult to predict with any certainty), although the time taken for the Tribunal process and decision would likely be considerable and hence would jeopardise the owners' current proposal and this is why they are prepared to offer a payment for a swift outcome.
14. The option to accept the capital sum offered is recommended and it provides a one off capital receipt for the council, whilst the planning conditions imposed on the premises should protect the Council's other nearby property interests.

### **Implications**

**Financial** – The variation of the covenant to allow use as a public house realises a capital receipt which reflects the uplift in value of the site after the covenant has been lifted.

**Human Resources (HR)** – None

**Equalities, Crime and Disorder and IT** – The owners of the property would have to apply for a licence to sell alcohol from the premises.

**Legal** – The refusal to lift a covenant can be subject to further legal challenge through the Lands Tribunal if it can be proved that the grounds for the original covenant no longer apply and would not cause detriment to the land owned by the council. Legal Services have advised that the covenant was placed on the property in 2007 at the time of the sale. So far as can be ascertained, no such covenant affected the property during the period of the Council's ownership.

**Property** – Contained within the Report.

**Other** – None

### **Risk Management**

15. There is a risk of legal challenge through the Lands Tribunal if the council refused to vary the restrictive covenant to allow use as a public house.

## Consultation

16. Ward Councillors have been consulted on this proposal and they object to the lifting of the covenant. Their comments are attached as an Annex 3 to this report.

## Recommendations

17. The Executive Member is asked to agree to the request to vary the restrictive covenant affecting 3-4 Patrick Pool so that the property can be used as a public house in exchange for a one -off consideration of £25,000.

Reason: To provide the Council with a one off consideration in exchange for the variation of the covenant.

<b>Contact Details</b>	
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<b>Specialist Implications Officer(s)</b> Gerard Allen – Senior Solicitor Property Ext: 2004	<b>Report Approved</b> ✓ <b>Date</b> 29 March 2014
<b>Wards Affected:</b> Guildhall	
<b>For further information please contact the author of the report</b>	

## Annexes

- Annex 1 Location Plan
- Annex 2 Copy of Planning Consent
- Annex 3 Ward Councillors' Comments