

	<b>REPORT TO THE LEADER 6 JULY 2011</b>
	<b>Key Decision</b> <b>NO</b>  <b>Forward Plan Ref No</b>
<b>Corporate Priority Meets all Corporate Priorities</b>	<b>Cabinet Portfolio Holder</b> <b>Cllrs Jeffels, Bastiman and Cockerill</b>

**REPORT OF: Head of Finance and Asset Management and Head of and Support Legal Services – 11/343**

**WARDS AFFECTED: All**

<b>SUBJECT: THE SANDS</b>
---------------------------

**1.0 PURPOSES OF THE REPORT**

Following on from the Council decision of 24 March 2011, to seek the Leader’s authorisation to enter into an Agreement on the terms set out in this report by means of a Supplemental Agreement between Benchmark Leisure Limited, Benchmark Properties Limited and the Council to extend the Sands Development Agreement currently in place.

**2.0 RECOMMENDATIONS:**

That the Leader authorises entry in a Supplemental Agreement with Benchmark Leisure Limited and Benchmark Properties Limited on the terms referred to in this report.

**REASON FOR RECOMMENDATIONS:**

To recognise the impact that the economic slowdown has had on progress of the Sands development and to give the new owner of Benchmark Leisure Limited the opportunity to finalise his plans to develop a water park on the Sands site in partnership with Alpamare and then to complete the development.

**HIGHLIGHTED RISKS:**

These are covered in the Risk Assessment to this report.

### **3. BACKGROUND AND INTRODUCTION**

- 3.1 The main points relating to the background to this report are covered in the Report to Council dated 24 March 2011 (Ref: 11/129).
- 3.2 On 24 March 2011, Council decided to accept Benchmark's proposals relating to an extension to the existing Development Agreement and in doing so:
- (a) Authorise officers to finalise negotiations with Benchmark to conclude an extension to the Development Agreement; and
  - (b) delegate authority to the Leader to authorise entry by the Council into a Supplemental Agreement with Benchmark Leisure Limited and Benchmark Properties Limited (as guarantor) to extend the existing Sands Development Agreement substantially on the terms set out in that report; and
  - (c) Approve the revised Masterplan (**Annex 1**) as representing the current aspirations of the Council as landowner for the development of the site, but not for any other purpose (in particular not providing any approval for any planning, licensing or Development Agreement purpose).

### **4. PROGRESS TO DATE**

- 4.1 At the March Council meeting it was reported that any extension to the Development Agreement and delivery of the water park phase as the next priority would be dependent on Benchmark having produced sufficient evidence within agreed timescales to satisfy the Council that it is in the best interests of the Council, the community and the future of the Sands development to grant the extension. This included:
- i) Benchmark's overall vision for the Sands;
  - ii) plans and a specification for the water park being agreed;
  - iii) a review of the legal position regarding an extension to the existing Development Agreement and confirmation of the terms to be applied to any extension;
  - ii) acceptable proposals from Benchmark being achieved to meet outstanding liabilities from Phase One of the development including the Open Air Theatre construction costs;
  - v) evidence of how the water park will be funded;
  - vi) completion of an agreement for lease with Alpamare, the proposed water park operators;
  - vii) a phasing plan for delivery of the water park and future phases including an agreed start on site for the water park.

- viii) Benchmark making substantial progress towards submitting the planning application for the water park phase
- 4.2 Any extension to the Development Agreement would be by means of a performance based Supplemental Agreement between the Council and Benchmark with break clauses for non-compliance, with reference to full Council for a decision.
- 4.3 On 8 June 2011, the Leader made an urgent decision to extend the existing Development Agreement by four weeks only as at that stage Benchmark had not provided sufficient evidence to satisfy the Council in accordance with the terms of the 24 March 2011 Council report. However, Benchmark were continuing to make progress and it was considered prudent to allow Benchmark an additional four week extension to continue to draw up their proposals.
- 4.4 This report will consider each of the issues set out in paragraph 4.1 in turn.

## **5. ISSUES RELATING TO EXTENDING THE DEVELOPMENT AGREEMENT**

### **5.1 Benchmark's overall vision for the Sands**

- 5.1.1 The revised Masterplan for the Development together with Benchmark's summary narrative setting out their overall ambitions for the Development were approved by Council as landowner at the 24 March 2011 meeting.
- 5.1.2 Benchmark have also now decided to make one single application for detailed planning permission to cover the whole of the site to support the concept of the overall Masterplan rather than separate applications for each remaining Phase. This approach has been welcomed by the Council's planners.

### **5.2 Plans and a specification for the water park**

- 5.2.1 A specification for the water park showing its main components are included at Schedule 4 to the proposed Supplemental Agreement. However, it should be noted that this remains subject to planning approval. In addition, the Council has yet to receive any written confirmation that the specification is approved by the proposed operator, Alpamare.

### **5.3 The legal position regarding an extension to the Development Agreement and the terms to be applied to any extension**

- 5.3.1 The Legal position regarding the extension to the Development Agreement was reported to Council in March.
- 5.3.2 A copy of the final Supplemental Agreement and a summary of its key terms is attached as an Appendix to this report.

**5.4 Evidence of how the water park will be funded and Benchmark's proposals for paying any outstanding liabilities from Phase One of the development including the Open Air Theatre and section 106 payments**

- 5.4.1 Benchmark intend to borrow the monies to construct the Waterpark through the bankers to ACI Investments, a company associated with Roland Duce, the current owner of Benchmark. The Council has received a brief letter from the advisers to the bankers broadly supporting the initial proposals. It is clear though that a lot more work needs to be done to reach full viability for the project.
- 5.4.2 Benchmark have nearly finalised the Completion Statement for Phase One. This shows sufficient monies to repay the cost of construction of the Open Air Theatre. Benchmark are intending to deposit 10% of the full OAT construction costs with the Council today. The remaining balance is to be paid in September in line with the attached agreement.
- 5.4.3 A contribution has been made towards the s106 payments. Further negotiations in relation to the education payments are continuing.

**5.5 Completed Agreement for Lease being agreed with Alpamare who are the proposed water park operators**

- 5.5.1 It was reported to Council in March that the lease arrangements with Alpamare would be based upon the lease incorporated within the existing Development Agreement and that an Agreement for Lease would be completed between Benchmark and Alpamare at the time of this report. However, it is understood that negotiations are still ongoing between Benchmark and Alpamare and officers are unable to report on progress under this heading at this time.
- 5.5.2 It is therefore proposed that the provision of the completed Agreement for Lease with Alpamare should be included in the Supplemental Agreement as a key milestone for the Council agreeing that any extension can continue beyond the first break point of 8 September 2011.

**5.6 A phasing plan for delivering the water park and future phases**

- 5.6.1 In the March Council report, Benchmark suggested that they expected to start site clearance for the water park in May 2012, subject to the submission of a detailed planning application for the waterpark phase only being submitted by July 2011 and approved by November 2011. Subject to planning approvals a start on site was anticipated in June 2012 with completion by November 2013. However, the date for the submission of the full detailed planning application for the whole site is now expected to be prior to September 2011. Again, the submission of the planning application will be a key milestone allowing the extension to progress beyond 8 September 2011.

5.6.2 A phasing plan for future phases will be required from Benchmark at that time.

## 5.7 **Submission of a planning application for the water park phase**

5.7.1 As noted above, Benchmark have moved from the position set out in the March 2011 report whereby they were only intending to submit a planning application for the waterpark phase and are now intending to submit a detailed planning application for the whole Development

5.7.2 Planning Services are working with Pegasus, Benchmark's planning consultants to ensure that the planning application is submitted with all necessary supporting documents. Following submission and full public consultation, it is currently anticipated that the Planning and Development Committee in January 2012 would consider the application.

## 6. **CONTINUING THE SANDS DEVELOPMENT OUTSIDE THE CURRENT CONTRACT**

6.1 The Council report of 24 March 2011 sets out the options for the Council should the Leader decide not to authorise entry into an extension to the Development Agreement with Benchmark.

## 7. **IMPLICATIONS**

### 7.1 **Policy**

There are no immediate policy implications to this report.

### 7.2 **Legal**

The legal Implications have been addressed within the body of this report and the annexes hereto.

### 7.3 **Financial Implications**

The financial implications have been addressed within the body of this report and the appendices to the March 2011 report.

Head of Finance and  
Asset Management

*Nicholas Edwards*

Head of Legal and Support Services

*JG Anderson*

**Author: Ian Anderson/Nick Edwards**

Telephone No: 01723 232348/2410

E-mail address: [Ian.Anderson@scarborough.gov.uk](mailto:Ian.Anderson@scarborough.gov.uk) and  
[Nick.Edwards@scarborough.gov.uk](mailto:Nick.Edwards@scarborough.gov.uk)

**Background Papers:** Council report dated 24 March 2011 (Ref: 11/129)

## RISK REGISTER – EXTENSION OF THE SANDS DEVELOPMENT AGREEMENT

No	Risk	Cause	Consequences	Mitigation	Current Risk Score	Target Score	Service Unit / Responsible Officer	Action Plan
1	The Leader does not approve the extension of the Development Agreement	<p>Failure of the developer to comply with the agreed actions for an extension to the Development Agreement</p> <p>Members have lost confidence in the Developer to deliver the Sands Development project.</p>	<ul style="list-style-type: none"> <li>• Loss of passionate partner</li> <li>• OAT costs of construction may not be fully repaid (Shortfall being the range of £0.5m to £0.8m)</li> <li>• No financial resource to fund a Water Park in the immediate future</li> <li>• The land value of £1.2m for the Water Park will not be realised</li> <li>• Council resources required to draw to a conclusion the original Development Agreement</li> <li>• Adverse Publicity</li> <li>• Loss of momentum / delays to the Sand project</li> <li>• Loss of confidence in the Council by prospective developers</li> <li>• Cost of re-tendering the Development Agreement</li> <li>• Re-tender may lead to concessions in the terms of the</li> </ul>	<ul style="list-style-type: none"> <li>• Officers have had extensive discussions with the developer</li> <li>• Developer has agreed in principle to fulfil the actions set out in the supplementary agreement</li> <li>• The terms are structured to incentives to deliver the Water Park</li> <li>• The extension guarantees the repayment of the OAT construction costs.</li> <li>• The developer has revised the master plan to be presented to Members</li> <li>• The new developer / owners of Benchmark is well-respected property developer. See letter of support from Lloyds bank</li> <li>• Operator of the water park has been identified and terms agreed</li> <li>• Members have previously approved the</li> </ul>	B5	B5	Strategic Director (David Archer)	None

No	Risk	Cause	Consequences	Mitigation	Current Risk Score	Target Score	Service Unit / Responsible Officer	Action Plan
			Development Agreement <ul style="list-style-type: none"> <li>Sands projects remains part developed in a key tourism area</li> <li>Catalyst for decline in the already developed North Bay businesses</li> </ul>	Development Agreement which is to be used for the extension.				
2	Planning are unable to process the planning application in a timely manner	Lack of staff resource  Other significant planning applications/work on other Council projects being processed at the same time.	<ul style="list-style-type: none"> <li>Delays in obtaining planning permission</li> <li>Slippage to other planning applications/development briefs</li> </ul>	<ul style="list-style-type: none"> <li>Planning Services will ensure resources are prioritised to ensure this scheme goes ahead on time</li> </ul>	C3	B3	Strategic Director (David Archer)	<ul style="list-style-type: none"> <li>Review planning resource levels / take on more staff</li> </ul>
3	The Development agreement is extended but the Waterpark is not delivered within the agreed timescale (up to 3 months delay)	Slippage in the construction programme	<ul style="list-style-type: none"> <li>Land Value to the Council of £1.2m is delayed</li> <li>Operator may walk away from the agreement</li> <li>Loss of confidence in the developer</li> <li>Adverse publicity</li> <li>Knock on impact to the remainder of the site</li> </ul>	<ul style="list-style-type: none"> <li>Set milestones within the supplementary agreement</li> <li>Willingness of developer to deliver the PVA</li> <li>Water Park operator sourced</li> </ul>	B3	B2	Strategic Director (David Archer)	<ul style="list-style-type: none"> <li>Ensure funding arrangements are sufficient and in place</li> <li>Establish SBC project management team to support development</li> </ul>
4	The Development Agreement is extended but the Water Park is not delivered at all	Lack of funding	<ul style="list-style-type: none"> <li>No Water Park</li> <li>Land Value to the Council of £1.2m is not realised</li> <li>Loss of momentum</li> <li>Loss of confidence</li> </ul>	<ul style="list-style-type: none"> <li>Supplementary agreement</li> <li>Letter of support from Lloyds Banks</li> </ul>	B5	B5	Head of Finance	<ul style="list-style-type: none"> <li>Ensure funding arrangements are sufficient and in place</li> </ul>

No	Risk	Cause	Consequences	Mitigation	Current Risk Score	Target Score	Service Unit / Responsible Officer	Action Plan
			<ul style="list-style-type: none"> <li>Termination of development agreement due to lack of performance</li> </ul>					
5	Failure to agree terms with the Waterpark operator	Unrealistic expectations on behalf of either party	<ul style="list-style-type: none"> <li>The Development Agreement will not be extended (See Risk 1)</li> </ul>	<ul style="list-style-type: none"> <li>Negotiations ongoing with operator and outline terms agreed</li> <li>Supplementary Agreement</li> </ul>	B5	B5	Strategic Director (David Archer)	None
6	The extension of the Development agreement breaches European Procurement Rules	The Council does not have the legal powers to extend the Development Agreement	<ul style="list-style-type: none"> <li>Legal and financial repercussions to the Council – potential compensation to developers</li> <li>The Council may face a legal challenge</li> <li>Incur costs obtaining legal opinion – defending Council position.</li> <li>External audit public interest report</li> <li>Have to re-tender the contract (time and cost implications)</li> <li>Lose the momentum of the Development</li> <li>Loss of confidence from developers in the Council.</li> </ul>	<p>Already obtained external legal advice which states a challenge could be reasonably defended on the grounds of:</p> <p>(i) The Supplemental Agreement proposed gives greater balance to the Council in terms of deliverability of the scheme.</p> <p>(ii) Given the unprecedented economic conditions over the last few years it is reasonable to extend the Development Agreement,</p>	B5	B4	Strategic Director (David Archer)	Examine whether insurance can be put in place to mitigate the financial consequence of a legal challenge



No	Risk	Cause	Consequences	Mitigation	Current Risk Score	Target Score	Service Unit / Responsible Officer	Action Plan
7	Insufficient Council resources to deal with the re-tender of the Sands Development Agreement	Not agreeing to extend the Development Agreement	<ul style="list-style-type: none"> <li>Reduced performance of certain services</li> <li>Slippage in the deliverability of other capital schemes</li> <li>Council employees may suffer from work related stress</li> </ul>	Accept the extension to the Development Agreement	D4	D4	Strategic Director (David Archer)	None
8	Failure to agree legal terms for the extension of the Development Agreement	Either the Council or the developer are unable/unwilling to accept the terms being offered.	<ul style="list-style-type: none"> <li>The project would have to be re-tendered – time and costs associated with this.</li> <li>Lose the momentum of the development.</li> </ul>	Extensive discussions have taken place between Council Officers and the developer.	B5	B5	Head of Legal Services  Strategic Director (David Archer)	None
9	Council determines to complete the development itself	Members decline to extend or re-tender the Development Agreement	<ul style="list-style-type: none"> <li>Significant Council borrowing required</li> <li>Changes to Prudential Indicators required</li> <li>Significant officer time required</li> <li>Limited experience as a developer</li> </ul>	Accept the extension to the Development Agreement	A5	A5	Strategic Director (David Archer)	Establish a wholly owned company to undertake the development

## Glossary of Terms

Risk	An event which may prevent the Council achieving its objectives
Consequences	The outcome if the risk materialised
Mitigation	The processes and procedures that are in place to reduce the risk
Current Risk Score	The likelihood and impact score with the current mitigation measures in place
Corporate Objectives	An assessment of the Corporate Objectives that are affected by the risk identified.
Target Risk Score	The likelihood and impact score that the Council is aiming to achieve
Service Unit Manager	The Service Unit or Officer responsible for managing the risk
Action Plan	The proposed actions to be implemented in order to reduce the risk to the target score

## Risk Scoring

Impact	5					
	4					
	3					
	2					
	1					
		A	B	C	D	E
	Likelihood					

### Likelihood:

A = Very Low  
 B = Not Likely  
 C = Likely  
 D = Very Likely  
 E = Almost Certain

### Impact

1 = Low  
 2 = Minor  
 3 = Medium  
 4 = Major  
 5 = Disaster