	<b>REPORT TO THE LEADER 27 OCTOBER 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 and Bastiman</b>

**REPORT OF: Head of and Support Legal Services – 11/511**

**WARDS AFFECTED: All**

**SUBJECT: THE SANDS – CALL-IN**

**RECOMMENDATIONS:**

That the Leader determines to:

- (a) to confirm the decision taken by Cabinet on 21 June 2011 to sell the freehold of Phase 1A of the Sands Development to Benchmark;
- (b) The disposal to be subject to the following amendments and covenants:
  - (i) the purchaser to be Benchmark Properties Ltd in place of Benchmark Leisure Ltd
  - (ii) the inclusion of an option providing the right for the Council to repurchase the land in 2157 for a sum that equates to the sale price for disposal of the freehold interest
  - (iii) a covenant precluding use of any part of the properties for an amusement arcade
  - (iv) a covenant ensuring the continuation of free passage across any roads, paths or other ways, to the public
  - (v) a covenant that prevents extension of the existing leasehold interest beyond 2157 without the consent of the Council, and an explicit statement that it is reasonable to refuse consent unless a premium is paid to the Council to reflect the value in the land beyond 2157

**REASON FOR RECOMMENDATIONS:**

To ensure that the concerns expressed by members of Full Council in relation to the decision of Cabinet to dispose of the freehold of Phase 1A of the Sands

Development to Benchmark are addressed by ensuring:

- (a) The Freehold and Leasehold interests do not become subsumed in one legal entity
- (b) Consequently the Council retains a right to buy back the freehold interest for a sum that will equate to the current sale price;
- (c) the future value of the land to the Council subsequent to re-purchase of the freehold interest is not lost
- (d) the use of the land in the future is appropriately constrained.

### **HIGHLIGHTED RISKS:**

These are covered in the Risk Assessment to this report.

## **1.0 PURPOSE OF THE REPORT**

Following the meeting of Resources Scrutiny Committee of 26 July 2011, and the subsequent referral of the issue to Full Council in September, to refer the matter back to the Leader so that the Leader may consider amending the decision of Cabinet in the light of the representations received from members of Council.

## **2. CORPORATE OBJECTIVES**

This report supports the objectives of creating a strong and diverse economy, protecting local environments and improving the Council.

## **3. BACKGROUND AND INTRODUCTION**

- 3.1 The main points relating to the background to this report are covered in the Report to Cabinet dated 21 June 2011 (Ref: 11/299) and call-in documentation referred to Resources Scrutiny Committee dated 26 July 2011 as Agenda Item 10.
- 3.2 On 21 June 2011, Cabinet resolved to
  - (a) treat with Benchmark Leisure Limited as a "Special Purchaser";
  - (b) sell the freehold interest of Phase 1A of the Sands Development (comprising Kepwick House and Lockton House) to Benchmark Leisure Limited for the sum identified in the report subject to Benchmark Leisure Limited and Benchmark Properties Limited entering into an extension to the existing Development Agreement ("DA") on the terms set out in the report to Council dated 24 March 2011.
- 3.3 On 27 June 2011, the decision made by Cabinet on 21 June was called in by five members on the basis that "it has always been understood that the

freehold of the site was to be retained by the Council (as custodians of resources on behalf of the electorate of Scarborough and to ensure that full control was retained over the management of the overall site – the sale of the freehold was never any part of the agreement. The highlighted risks represent more of a “gun to the head” tactics. The apartments were only built on condition that they cross funded the PVA. It is not an option. The apartments are sold and Benchmark have the obligation to deliver.”

#### **4. SUBSEQUENT ACTIONS**

- 4.1 At the July Resources Scrutiny meeting, Committee members reviewed the 21 June Cabinet decision at length. At the invitation of the Chairman, Councillors J Armsby, Ms A Robinson, S Sharma and P Popple also were given the opportunity to speak at the meeting.
- 4.2 The concerns expressed at the meeting were threefold:
- (a) the potential precedent for this and other developments
  - (b) the absence of mechanisms for prevention of use of land that was inconsistent with the Council’s original aspirations
  - (c) the price being paid for the freehold being below market value
- 4.3 The Overview and Scrutiny Committee determined to request the Leader of the Council not to make a decision following the call-in without first referring the matter to Council for their opinion. The Leader agreed to accede to this request and the issue was referred to Council for review.
- 4.4 In the light of observations made at Scrutiny Committee, Council officers sought to secure revised terms which would allow the Borough Council to buy back the freehold interest in the land at a date in the future.
- 4.4 At the meeting of Council on 5 September 2011 members expressed views that were accepting of the suggestion of disposal of the freehold interest in Phase 1A of the Sands development, subject to a right of buy back, however, they sought reassurance that at the point that such disposal was effected, their concerns in relation to the proposed arrangements were addressed, in particular by ensuring:
- (a) that any right of buy back could be effected by the Council in the future
  - (b) the cost of buying back the freehold was at an equivalent sum to that being paid for freehold by Benchmark
  - (c) any potential for the tenant to reduce the future value in the freehold interest by extensions of the existing leasehold interest or similar measure was negated
- 4.5 Subsequent to the meeting of Council on 5 September a form of legal transfer has been produced to address these concerns which incorporates, the following:

#### **4.5.1 An option to the Council to buy the Property at the Purchase Price:**

(a) the Purchase Price is defined within the agreement as the sum paid to the Council by Benchmark Properties Ltd with all accrued interest on that sum until the option is exercised,

(b) the period when the Option may be exercised is defined as 31 October 2158 to 31 January 2159

(c) the agreement recognises that in the period between 2011 and 2158 there are likely to be changes in the law of the country, and commits each party to achieving the intentions of the current agreement despite any intervening changes in the law

#### **4.5.2 Transfer of the Freehold Interest to Benchmark Properties**

Benchmark Properties acts as the guarantor for the Sands development. It is a separate entity to the Leaseholder, Benchmark Leisure Ltd and as such title of any freehold land will remain separated from the Leasehold Interest and remain capable of being transferred back to the Council at the expiry of the Option Period.

#### **4.5.3 Restrictive Covenants upon the transferee:**

The following covenants are incorporated into the transfer on behalf of the Council and its successors in title, and will be registered at the Land Registry to give notice of their existence to any potential future owner of the land:

(a) Not to use the Property or any part of it for the purposes of the business of an amusement arcade operator except that up to two coin or token operated machines shall be permitted on the Property at any one time;

(b) To maintain and not underlet or part with possession of any of the roads, paths, or other ways so as to prevent the free use of them by the public/other users

(c) Not without the consent of the Council to grant a lease beyond the Option date; subject to the consent of the Council not being unreasonably withheld, it being agreed however, that it is reasonable for the Council to refuse consent where a premium is to be paid for a lease will have the effect of extending a lease beyond the Option date, unless the Transferor has agreed to pay the part of the premium which represents the period after the Option date to the Council

#### **4.6 The option and the covenants ensure that: -**

a) the Council retains a right to purchase back the freehold in 2157/8 (the date when the lease would have expired) for no greater sum than that which has been paid by Benchmark Properties.

b) the premises cannot ever be used as an amusement arcade without the express agreement of the Council;

c) the owner is precluded from extending any sublease of the premises in a manner which removes the residual value in freehold interest.

d) any perception of a precedent arising from the disposal of the freehold is one which is severely limited and fully protects the Councils interests

- 4.7 As a general rule covenants imposed on freehold titles are not as easy to enforce as those imposed in leases. This was a matter raised by members at Resources Scrutiny Committee. However, officers are of the opinion that as the Council will remain the freehold owner of land adjoining the Phase 1A property, the Council will be in a stronger position to enforce the covenants or to resist any application to have the covenants removed or released. Furthermore, the inclusion of a clause indicating that should changes in the law occur in the intervening years, the parties will act in a manner to effect the original intention of the parties provides a legal basis for challenging any unforeseen impact of subsequent changes in the law.
- 4.8 Furthermore, the Council will register its interest against the freehold, making it enforceable against any third party who may subsequently purchase the property from Benchmark.

## **5. IMPLICATIONS**

### **5.1 Policy**

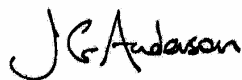
There are no immediate policy implications to this report.

### **5.2 Legal**

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

### **5.3 Financial Implications**

The financial implications have been addressed within the body of this report and the supporting information.



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**Background Papers:**

- Cabinet report dated 21 June 2011 (Ref: 11/299)
- Call-in documentation referred to Resources Scrutiny Committee dated 26 July 2011 as Agenda Item 10
- Minutes of Resources Scrutiny Committee Agenda Item 10 from 26 July 2011
- Report to Council dated 5 September 2011 (Ref: 11/410)
- Minutes of Council of 5 September 2011

