

CABINET

18 September 2018

Title: Development of Site at London Road / North Street, Barking	
Report of the Cabinet Member for Regeneration and Social Housing	
Open Report with Exempt Appendix 2 (relevant legislation: paragraph 3 of Part I of Schedule 12A of the Local Government Act 1972 as amended)	For Decision
Wards Affected: Abbey	Key Decision: Yes
Report Author: David Harley, Head of Regeneration, Be First	Contact Details: Tel: 020 227 5316 E-mail: david.harley@befirst.london
Accountable Director: Ed Skeates, Development Director, Be First	
Accountable Strategic Leadership Director: Claire Symonds, Chief Operating Officer	
Summary <p>The former White Horse public house on the junction of London Road and North Street in Barking Town Centre has lain empty for a number of years and is a clear example of a development opportunity site. It lies adjacent to Council owned land currently being used by Transport for London as a bus layover facility. An opportunity has arisen to work with the landowner of the former public house site (Robyna Ltd) on bringing both sites forward for a comprehensive scheme unlocking development of new homes and jobs as well as delivering income for the Council.</p> <p>It is proposed that, in conjunction with the Council, Robyna Ltd will redevelop the combined site for a 164 unit residential-led build-to-rent scheme with commercial use on the ground floor.</p> <p>It is proposed that the Council will take ownership of the Robyna land and grant the developer a 250-year head lease across the combined sites, subject to the payment of an annual head rent. The Council would provide development finance of up to 80% of the build cost gaining a return on this funding. This report sets out the details of the development, the parties, loan funding and deal structure.</p>	
Recommendation(s) <p>The Cabinet is recommended to:</p> <p>(i) Agree to enter into necessary agreements with Robyna Ltd to enable them to develop a residential-led development on land owned by both the Council and Robyna Ltd, upon satisfaction of various conditions precedent; whereby the Council would acquire the freehold ownership of the Robyna Ltd site and grant Robyna Ltd a head lease on the combined sites for 250 (+3 for construction) years subject to the payment of a head rent and all subject to appropriate due diligence;</p>	

- (ii) Approve a loan of up to £35m to Robyna Ltd based on the terms set out in Appendix 2 to the report, with the borrowing to be funded through the General Fund from the Public Works Loan Board;
- (iii) Delegate authority to the Chief Operating Officer, in consultation with Director of Law and Governance and the Cabinet Member for Regeneration and Social Housing, to agree the final terms of the loan and the contract documents to fully implement and effect the proposals set out in the report; and
- (iv) Authorise the Director of Law and Governance, or an authorised delegate on her behalf, in consultation with the Chief Operating Officer, to execute all the legal agreements, contracts and other documents on behalf of the Council.

Reason(s)

The initiative will contribute significantly to the Council's priority of 'Growing the Borough'. The project will have a significant impact at a gateway entrance to Barking town centre and provide additional homes within the borough.

1. Introduction and Background

- 1.1 The western entrance to Barking town centre is focused on the junction of North Street and London Road. The site on the south east corner has already been redeveloped to include a 100-unit build-to-rent scheme by Grainger (the 'Abbeville Apartments') above a new Asda store and car park. On the northern eastern side is the subject site formed of (i) a cleared, hoarded, plot which was once the site of the White Horse Public House but has now been vacant for some years, and (ii) an area of hardstanding currently used by TfL as a bus lay-over facility. See Site Plan at Appendix 1.
- 1.2 The White Horse site is owned by Robyna Ltd, a British Virgin Island ("BVI") registered company and the developer of the site, who are represented in the UK by Yara Capital (an asset manager).
- 1.3 The bus lay-over is owned by the Council but leased to TfL (who are holding over under a contractually expired lease paying no rent). The site is used for a combination of bus services including: the terminus for the No.169 bus route (final stop for passengers is London Road), rail-replacement bus provision and service resilience generally. A report setting out alternative arrangements for bus provision in the town centre has been produced and Be First have secured initial approval from TfL. The public do not access the lay-over facility. It is proposed as part of the arrangement, the bus lay-over facility will be relocated to a combination of three other nearby locations depending on service requirements.
- 1.4 Be First have been in discussion with Robyna Ltd / Yara Capital for some time over a comprehensive, residential led, redevelopment scheme across the combined sites. This will create 164 built-to-rent units, 35% of which will be affordable (discounted market rent), with some commercial space on the ground floor. The scheme would also include communal space for residents. The discussions with Robyna Ltd have been predicated on the Council acquiring their site to ensure

ownership of the totality of the land and granting them a head lease on the whole in return for a long-term income stream based upon the Council's value in the development.

- 1.5 The Council will also be the principle provider of construction finance to the Robyna Ltd, generating an additional source of income from the development. Robyna could secure alternative finance on at least comparable terms however this option generates greater control for the Council as well as returns.
- 1.6 The site currently is a classic example of a development plot awaiting construction. It has been considered an 'eyesore site' for some time and early regeneration is considered desirable. After many months of discussion, terms have now been agreed to bring the site forward for development which should see work commence within 12 months, subject to planning consent being granted and other conditions precedent being satisfied.

2. Proposal and Issues

- 2.1 Subject to appropriate due diligence by the Council, it is proposed to enter into agreement with Robyna Ltd to proceed with a comprehensive development across the combined sites upon satisfaction of various conditions precedent; these include: planning consent, valuation advice and relocation of the TfL facility. The Council will acquire the freehold ownership of the Robyna site and grant Robyna Ltd a 250-year head lease (plus 3 years for the development period) subject to the payment of an agreed head rent (set out in Appendix 2). The lease will be terminable by the Council in the event the development fails to complete or default by the developer.
- 2.2 Robyna Ltd is proposing a 10-storey block across the combined site with a 16-storey tower at the intersection of London Road and North Street. There will be commercial units on the ground floor. Initial pre-application meetings have been held with the planners.
- 2.3 The Council will contribute half of the costs of securing planning consent up to a maximum of £250k, which is to be jointly made by the developer and the Council as landowner. This contribution will be payable upon the grant of the head lease.
- 2.4 The 164 units will be run as PRS homes for a minimum of 15 years (an expected S106 condition) with at least 35% discount-to-market units (57 units) being provided. The block would be managed as a single development. The number of affordable units will also be secured by way of a contractual lease obligation for the duration of the term alongside any planning obligation.
- 2.5 Robyna Ltd have made initial planning enquiries and the principles for redevelopment have been agreed. There would be no impact on the London Road multi-storey car park. Further, the proposed development does not prejudice the opportunity to bring forward the adjacent site on London Road (Nos 14-34) for regeneration in the future.
- 2.6 Robyna Ltd is seeking to exchange agreements during October/November 2018 and submit a joint planning application immediately thereafter. Construction should commence in 2019 with completion in 2021/2022.

3. Options Appraisal

The following options have been assessed:

- 3.1 **Option 1 – Do Nothing** - Approximately one half of the site is outside the control of the Council. Should the decision be taken to 'do nothing', it is possible that Robyna Ltd will seek to bring forward a smaller scheme in isolation on their own land. It is unlikely that such a scheme would deliver the full planning potential of this key, landmark site and will not release any marriage value to be shared with the Council from the merging of the two parcels of land in a comprehensive, larger, scheme. There would be a lower rate of new homes bonus, Council Tax and business rates. This principle also relates in isolation to the Council's own portion of the site.

If agreement cannot be reached to work together with the Council, Robyna Ltd may delay or even abandon plans for redevelopment. This would fail to realise the regeneration potential of the site and will result in the continuation of the 'eyesore', with the on-going potential for antisocial use.

The Council could continue to lease their own site to TfL as a bus lay-over yard but seek to negotiate a rent – although this may be challenging given the shared objective of supporting bus service provision.

- 3.2 **Option 2 – Develop in isolation** - The Council could develop its portion of the site in isolation but, as noted above, it will fail to benefit from a larger, more efficient and ambitious scheme with the associated regeneration benefits.

The Council could try to acquire Robyna Ltd's land through compulsory purchase however this is unlikely to be successful given their desire to deliver development.

- 3.3 **Option 3 (Favoured Option) – Enter into agreement with Robyna Ltd to acquire, fund the development (up to 80%) and hold long term** - Through the proposed approach, whilst the Council will not be leading on the delivery of the scheme, control will be retained via the head lease arrangement under which an annual head rent will be paid. The scheme also compliments and is integral to the overall regeneration vision of the wider Town Centre. The leasehold arrangement with the developer also allows the Council to benefit from the regular income generated from the site although it exposes the Council to risk if the site is not developed or the Council has to step in.

To bring this key site forward for regeneration and maximise the site through an enlarged scheme across the two ownerships, the Council should engage and treat with the adjoining landowner, Robyna Ltd. Enhanced due diligence has not raised issues with Robyna Ltd but the Council will take steps to ensure that full measures are put in place to take early control of the land including contractual step in rights in the event of default. Robyna Ltd would fund the remaining 20% of costs from their own equity (ie no other lender). Development finance payments will be staged on periodic independently certified construction work to reduce risk, however it is acknowledged that stepping in may result in additional costs and delays to enable the building to be completed.

- 3.4 **Option 4 – As Option 3 but without providing development funding** - The ability for the Council to fund the scheme, whether up to the agreed proportion in Option 3 or a lesser amount (Option 5), provides a further degree of control over the scheme being brought forward. In the event of developer default, the Council would have direct rights to step in and complete the development. Third party funders would typically require their own preferential step in rights to sell the scheme, potentially leading to significant 'stand still' periods on site. Lenders will also wish to have control over the land during construction by way of a first legal charge over the remainder. This would introduce issues of priority in the event of joint Council/lender funding situation.

The opportunity to generate a further income stream for the Council during construction would also be lost.

- 3.5 **Option 5 – As Option 3 but with Council just providing 50% of Development finance** - A lower percentage of development finance would reduce the amount of Council borrowing required, however it would also result in lower returns and less control as set out for Option 4. This particular option would introduce issues of priority over the debt in the event of the Council and another lender both funding the scheme. Another funder would typically seek to rank first and such negotiations would delay progress alongside however the control risks set out for option 4.
- 3.6 **Option 6 – Sell Council land to Robyna Ltd or another party** - The Council could sell its landholding to Robyna Ltd who would then be likely to progress the development proposal independently of the Council. A one-off capital receipt would be generated however it would fail to give the Council the ability to secure a long-term rental income stream, the return from the development finance and a role in ensuring the development comes forward, together with the quality and content of the scheme. Selling the site to another party would similarly result in potential for the site to lie empty and not deliver the additional homes delivered by a combined scheme.

4. Consultation

- 4.1 Consultation on the development proposals is undertaken through the statutory consultation process which precedes the planning process.
- 4.2 Officer consultation has occurred through the Investment Panel assessing the due diligence information and reports from external advisors.
- 4.3 The Be First Board approved the proposal at their September meeting.

5. Financial Implications

Implications completed by: David Dickinson, Investment Fund Manager

- 5.1 The report in part seeks to gain approval for a loan to Robyna Ltd for a proportion of the construction costs. The loan terms and due diligence were reviewed by the Investment Panel and fuller details are shown in Appendix 2, which is in the exempt section of the agenda as it contains the commercially confidential terms of the proposed arrangements (relevant legislation - paragraph 3 of Part 1 of Schedule 12A of the Local Government Act 1972 (as amended)) and the public interest in

maintaining the exemption outweighs the public interest in disclosing the information.

5.2 The development is not one of the 44 schemes agreed as part of the Investment and Acquisitions Strategy (IAS) and the proposal for on-lending is not an asset class within the IAS.

5.3 **Financial Implications on the On-lending Proposal**

5.3.1 Lending to commercial entities can generate revenue from interest payments and arrangement fees and can progress previously stalled projects. Councils have the following power to lend:

- i. A council has a specific power to invest under Section 12 of the Local Government Act 2003.
- ii. A council has a specific power to make a loan under Section 24 of the Local Government Act 1988 (housing loans only).
- iii. A council has a general power to borrow under Section 1 of the Local Government Act 2003.
- iv. A council also has a general power to borrow and to make loans under the General Power of Competence in Section 1 of the Localism Act 2011. This power is not to be relied upon as a specific power to lend or invest but rather to supplement Section 12 of the Local Government Act 2003 or Section 24 of the Local Government Act 1988 when investing or lending.

5.3.2 The Council can make the proposed loan to Robyna Ltd and does not need to seek approval from the Financial Conduct Authority (FCA).

5.3.3 State Aid

If a council provides a loan on market terms, it should not be State Aid because the council is acting in line with the Market Economy Investor Principle (the "MEIP"). When making such loans, councils will need to carry out prior due diligence to demonstrate that the loan is a prudent use of the council's resources and such that any other lender (i.e. banks) would have provided a loan on those terms.

Be First have obtained confirmation from their legal and financial advisors that the loan terms are in line with the MEIP requirements.

5.3.4 Due Diligence

Be First has carried out due diligence on Robyna Ltd and its parties that are associated with them. The Due Diligence completed to date has not raised any issues. Further information on due diligence is contained in Appendix 2 in the exempt section of the agenda.

5.3.5 Security

The proposal is for the Council to lend up to 80% of the Loan to Cost and to receive unfettered freehold title of the White Horse land.

The Council will have legal charge over the loan asset and full step in rights will be provided to the Council in the event of borrower default to enable the lender to complete the scheme. Direct joint appointments or warranties will be provided with the principle consultants and contractor.

It must be highlighted that the Council will contribute up to £250,000 towards pre-budgeted planning promotion expenses. Payment of this contribution will be made upon either (i) the grant of the head lease to Robyna Ltd or (ii) the Council unilaterally deciding to withdraw from negotiations.

The HOTs allow for the loan to run on for 6 months post completion to facilitate refinancing, but the overall term is capped at 3 years. Post completion, the security and step in arrangements will still exist.

Be First have advised that it is Robyna Ltd's intention to hold the investment but should they opt to sell, the detailed drafting of the loan documents will ensure the loan has to be cleared first and will need to be subject to further due diligence checks.

5.4 Income Stream

- 5.4.1 After the site is developed, the Council will be entitled to an annual rental income stream from the lease as set out in appendix 2.

6. Legal Implications

Implications completed by: Suzan Yildiz, Deputy Head of Legal Services (Commercial) Law and Governance and Dr. Paul Feild, Senior Governance Lawyer

- 6.1 During this project the Council has received advice from external legal advisors Gowlings WLG. A summary of the key legal implications is set out below.
- 6.2 Council Powers - The Council's power to participate in the transaction as set out in this report is the general power of competence under section 1 of the Localism Act 2011. This provides the Council with the power to do anything that individuals generally may do. Section 1(5) of the Localism Act provides that the general power of competence under section 1 is not limited by the existence of any other power of the authority which (to any extent) overlaps with the general power of competence. The use of the power in section 1 of the Localism Act 2011 is, akin to the use of any other powers, subject to Wednesbury reasonableness constraints and must be used for a proper purpose.
- 6.3 Whilst the general power of competence in section 1 of the Localism Act 2011 provides sufficient power for the Council to participate in the transaction and enter into the relevant project documents further support is available under Section 111 of the Local Government Act 1972 which enables the Council to do anything which is calculated to facilitate, or is conducive to or incidental to, the discharge of any of its functions, whether or not involving expenditure, borrowing or lending money, or the acquisition or disposal of any rights or property.

- 6.4 In exercising the power of general competence and in making any investment decisions, the Council must also have regard to the following, each of which is considered in turn: -
- i. Compliance with the Statutory Guidance on Local Government Investments;
 - ii. Fulfilling its fiduciary duty to tax payers;
 - iii. Obtaining best consideration for any disposal;
 - iv. Compliance with Section 24 of the Local Government Act 1988 in relation to giving financial assistance to any person (which either benefits from a general consent or requires express consent by the Secretary of State);
 - v. Compliance with any other relevant considerations such as state aid and procurement;
- 6.5 Section 15 of the Local Government Act 2003, which requires that the Council have regard to statutory guidance in relation to exercising its borrowing and investment powers. The relevant Statutory Guidance on Local Government Investments (3rd Edition, issued on 1 April 2018). In accordance with the Guidance (paragraphs 33 and 34), A local authority may choose to make loans to local enterprises, local charities, wholly owned companies and joint ventures as part of a wider strategy for local economic growth even though those loans may not all be seen as prudent if adopting a narrow definition of prioritising security and liquidity provided that the overall Investment Strategy demonstrates that:
- (i). The total financial exposure to such loans is proportionate;
 - (ii). An expected 'credit loss model' has been adopted to measure the credit risk of the overall loan portfolio;
 - (iii). Appropriate credit controls are in place to recover overdue re-payments; and
 - (iv). The Council has formally agreed the total level of loans by type and the total loan book is within self-assessed limits.
- 6.6 The Council has the power to acquire Robyna Ltd 's interest and grant the long lease in reliance on sections 120 and 123 (respectively) of the Local Government Act 1972. In doing so the Council must secure the best consideration reasonably obtainable for its land where it is disposed of under s123. GVA has been retained to advise the Council that this requirement has been satisfied so that the consent of the Secretary of State is not required.
- 6.7 As local government is an emanation of the state the Council must comply with European law regarding State Aid. This means that local authorities cannot subsidise commercial transactions such as for example low cost finance. In this transaction, State Aid law is relevant in the context of the funding being provided and the price at which the Council's land interest is disposed of. For the loan not to amount to State Aid, it must be made on 'market terms' in order to satisfy the "Market Economy Investor Principle". GVA has been retained to advise the arrangements are on a commercial footing. The external legal advisor Gowlings WLG will confirm the position once the legal terms are settled.
- 6.8 As part of the transaction Robyna Ltd will commit to develop out the combined land interest. This could amount to a contract for works that ordinarily would require a competitive procurement exercise in accordance with the Public Contracts

Regulations 2015. The Council will undertake a negotiated procedure but without competition as Robyna Ltd owns a substantial proportion of the site.

7. Other Implications:

7.1 Risk Management

- **Construction Risk** - Robyna Ltd will hold the construction risk during the development programme, thereby limiting the Council's exposure. Security arrangements for the performance of Robyna Ltd and, in turn, the contractor is set out in the Heads of Terms.
- **Market Risk** – Robyna Ltd will be obliged to pay the rent irrespective of the leasing or sale of the residential units being delivered.
- **Funding risk** - The Council will take ownership of the land at the point of entering into the development and funding agreements. Appropriate safeguards are to be built into the documentation.
- **Ground contamination** – Full ground investigations will be undertaken as part of the due diligence process.

7.2 **Contractual Issues** - Contractual implications are as described and covered within the Legal Implications section of this report.

7.3 **Staffing Issues** – The project will be managed on behalf of the Council by Be First, with the main element of resource being required to get the scheme in to contract. Surveyors will be appointed to monitor construction and expenditure during the construction phase of the project.

7.4 **Corporate Policy and Equality Impact** - These issues will be considered as part of the assessment of the planning application for the scheme. In terms of existing use, the bus terminus is not used by the public anyway however the alternative provision has considered equalities implications.

7.5 **Safeguarding Adults and Children** – Design development undertaken on all new projects by Be First will take into account the needs of local communities including children, with a focus on creating high-quality, accessible spaces that allow for freedom of movement and social cohesion. Be First will work with the developer to ensure that the development process will explore opportunities to introduce new or improve existing play facilities.

7.6 **Health Issues** – There is considerable evidence that improvements to housing and the local environment can improve health and well-being outcomes for local people. Health issue will be taken into consideration during the development process, where applicable, with a view to improving health and well-being for new and existing residents.

7.7 **Crime and Disorder Issues** – Section 17 of the Crime and Disorder Act 1998 places a responsibility on councils to consider the crime and disorder implications of any proposals. The proposals set out in this report will help make the areas safer by improving the quality of the environment, creating safer more natural surveillance for public areas and pedestrian routes. The development makes use of a currently vacant, brownfield site, which is currently at risk of illegal occupation or fly tipping.

The development proposals will therefore have a positive impact on the local community.

- 7.8 **Property / Asset Issues** - The transaction will see the Council taking ownership of additional freehold land within the borough, albeit that the site will be leased for 250 years subject to a long-term income stream.

Public Background Papers Used in the Preparation of the Report: None

List of appendices:

Appendix 1 - Site plan

Appendix 2 - Financial and Due Diligence Details (exempt document)