

Subject:	King Alfred Development Agreement		
Date of Meeting:	24 January 2019		
Report of:	Executive Director Economy Environment & Culture		
Contact Officer:	Name:	Mark Jago	Tel: 01273 291106
	Email:	mark.jago@brighton-hove.gov.uk	
Ward(s) affected:	Central Hove (directly) all others indirectly		

FOR GENERAL RELEASE

1. PURPOSE OF REPORT AND POLICY CONTEXT:

- 1.1 At its 6th December 2018 meeting the Policy Resources & Growth Committee received a detailed report that advised of the background to the delays encountered by the project since selection of the Preferred Developer (“the developer”) in January 2016, and of the continuing financial challenges that led the developer to seek the Council’s agreement to revise the terms of the draft Development Agreement (“DA”). The previous report also identified the movements in financial viability since 2016, and the work undertaken by the Council and developer during the past 3 years, aimed at returning the project to viability.
- 1.2 This report advises the committee of progress made in negotiating the terms of the DA since the last meeting, and seeks agreement for the Council to enter into the DA with Crest Nicholson Operations Limited by the end of January 2019.

2. RECOMMENDATIONS:

That Policy Resources & Growth Committee:

- 2.1 Notes the work undertaken in negotiating the final terms of the Development Agreement with Crest Nicholson since the 6th December meeting;
- 2.2 Authorises officers to enter into the Development Agreement on the terms set out in the Summary attached at Appendix A to this report, the full version of which (excluding Annexures) is presented in the Part 2 report to this committee;
- 2.3 Grants delegated authority to the Executive Director for Economy, Environment & Culture, Assistant Director Property & Design and the Executive Lead Officer – Strategy, Governance & Law to make minor amendments to the Development Agreement, settle all the legal documents and take any other necessary steps required to implement the recommendation at 2.2;
- 2.4 Approves the Council’s capital contribution of £8m (in accordance with the decision of Policy & Resources on 21 January 2016) towards the development of the new public sport and leisure centre, the sum to be through borrowing and the

financing costs funded by forecast operational savings resulting in a cost neutral position for the Council;

- 2.5 Agrees in principle to appropriate the site for planning purposes and delegates authority to the Executive Director for Economy, Environment & Culture to appropriate the site for planning purposes once the indemnity described in paragraph 3.25 has been executed and satisfactory planning permission has been secured;
- 2.6 Agrees in principle that the council will authorise the use of S203 and delegates the final decision to authorise the use of S203 powers to the Executive Director for Economy, Environment & Culture;

3. CONTEXT/ BACKGROUND INFORMATION:

- 3.1 Redevelopment of the King Alfred Leisure Centre, the city's largest indoor sports facility, has been a priority for many years. The current centre is expensive to operate and maintain, fails to meet modern expectations, and is nearing the end of its useful life. There is an urgent need for improved, modern and extended facilities serving the west of the city. Redevelopment of the existing Leisure Centre as part of a mixed-use development including new homes and retail provision is in the economic and social interests of the area as it will provide a much needed new sports facility for residents of Hove. It will also create jobs and contribute to the regeneration of this area of the seafront.
- 3.2 The previous report to this committee provided a comprehensive update on the challenges and key activities in the period since the developer's appointment. It also advised of the developer's final proposals aimed at finally addressing financial viability and secured committee agreement to revised terms relating to the provision of Affordable Housing and that officers should continue negotiations with a view to finalising legal terms by the time of this committee meeting.
- 3.3 At the 6th December meeting the committee resolved:
 - That officers should continue to negotiate a final DA with Crest Nicholson with a view to entering into the DA before the end of January 2019;
 - Noted the draft Affordable Housing Provisions, that these were subject to ongoing negotiations, and noted with grave concern that this was an amendment to Crest's final tender;
 - Noted the intention for officers to prepare and issue a 'standstill letter' advising Bouygues Development of the change, in line with procurement regulations;
 - Noted that there would be a further report brought to this meeting of the committee to agree the final DA;
 - To explore alternative options for the delivery of the redevelopment of the King Alfred site, including delivery of a Sport & Leisure complex for Hove, if the DA is not agreed by the end of January 2019

Standstill Letter

- 3.4 At the time of the 6th December committee meeting the Affordable Housing Provisions were in draft form. Further negotiations followed and this resulted in refinement of the provisions, albeit they remain in materially the same form as was reported to Committee in December. They were finalised on the 24th December.
- 3.5 The contract Standstill letter authorised by the committee at its last meeting was issued to Bouygues Development on 24th December. The letter advised Bouygues, as the unsuccessful bidder, of the proposed revised contractual terms relating to Affordable Housing and set a deadline should they wish to challenge this. The standard 10 day period was extended to 11th January 2019 to take account of the Christmas period. The deadline passed with no response received from Bouygues. The 30 day procurement challenge period will have expired by the time of the committee meeting and members will be advised in the event that such a challenge is forthcoming.

Development Agreement

- 3.6 Legal negotiations continued immediately following the 6th December committee meeting, with considerable progress made during December, culminating in final all-party legal meetings on 10th and 14th January. The final meeting enabled the parties to satisfactorily resolve all outstanding matters resulting in the Final DA attached as Appendix 1 to the Part 2 report, a Summary of which is attached as Appendix 1 to this report.
- 3.7 The DA is between Brighton & Hove City Council and Crest Nicholson Operations Limited. It places obligations on both parties and is geared towards ensuring the developer progresses the project in a timely fashion. This initially requires the developer to advance detailed design work, including public consultation, leading to submission of a detailed planning application, obtaining a planning consent, and then moving to delivery of the development.
- 3.8 There are a number of milestones early in the project which, if the developer is unable to achieve these by the specified dates set out in the DA, then the Council has the ability to determine the agreement (i.e. terminate it). During the first 12 month period these include:
- the Housing Infrastructure Fund funding agreement must be signed within 3 months of the signing of the DA (see section 3.14, below);
 - a requirement for the developer to submit detailed design proposals to the Council (as landowner) within 10 months of entering into the DA;
 - the detailed planning application must be submitted within 12 months of entering into the DA (or one month after any Council objections have been settled).
- 3.9 Crest's Board is due to consider the final terms of the DA at a meeting scheduled for w/e 18th January. A letter from the Crest Board confirming agreement, and with a firm commitment to immediately mobilise its team in order to develop the

design in accordance with the conditions and programme, is expected ahead of the committee meeting and members will be updated accordingly. With the committee's agreement to the recommendations set out in this report, the parties intend to enter into the DA by the end of January 2019.

Financial Viability

- 3.10 The previous report to this committee was explicit about the scale of the funding gap identified by the developer in November 2018. It showed a gap of some £29m based on the developer's 20% profit requirement and delivery of 20% affordable housing, and which even with 0% affordable housing the profit level achieved only 12.4% profit and a reduced funding gap of £19m.
- 3.11 Since the previous report, Deloitte LLP, the Council's Commercial Advisors, have completed a detailed assessment of the developer's appraisal and cost and value assumptions. Deloitte's report is attached as Appendix 2 within Part 2 of the committee papers.
- 3.12 The Deloitte report emphasises that whilst entering into the DA is a key milestone, the project remains financially challenging. This will remain the case, and will require the developer to identify further cost savings linked with additional revenues, if the viability challenges are to be addressed, and if the project is to move to construction. Failure to address this in what is a relatively short space of time will result in an inability to satisfy the Viability Condition. One possibility is that the developer could propose further revisions to the scheme for which it was selected. Previous proposals have been ruled out by the Council, particularly in relation to the specification of the Sports Centre. Any such requests would have to be agreed by Members, and Crest's ability to materially deviate from its final tender submission and the Council's original requirements, are limited by public procurement rules.

Housing Infrastructure Fund

- 3.13 The Housing Infrastructure Fund (HIF) is £2.3 billion of government funding available to Local Authorities, £300m of which is available to 'Marginal Viability' projects such as the King Alfred. HIF guidance states that £10m is the maximum amount typically available to individual projects.
- 3.14 The December 2018 PR&G report set out that on 1st February 2018 the Ministry of Housing, Communities and Local Government announced that the King Alfred scheme was among the successful bids and at £15.222m it was the second highest award in the country. The report also set out that there were some delays in receiving formal confirmation of the HIF offer, and that the tight timetable linked to the HIF funding is a key project risk and means that the project needs to move at pace to ensure the HIF funding can be accessed. For this reason the DA sets out an early opportunity for the parties to determine the agreement 3 months from entering into the DA if in that time the developer has not confirmed its approval of the final HIF funding agreement and has not entered into the HIF deed of indemnity, pursuant to which the developer indemnifies the Council against (amongst other things) an obligation to repay the HIF grant.

Council Capital Contribution

- 3.15 Through the Council's financial analysis and preparatory work undertaken in 2013/14, it was agreed, in acknowledgement of the known financial challenges, that there was scope for the Council to make a capital contribution towards the cost of the new sports centre. This on the basis that the Council expects the new Sports & Leisure Facility to deliver significant operational savings compared to the cost of running the existing facility. In marketing the development opportunity in 2014, the Council's 'Memorandum of Information' (October 2014) advised potential bidders that "In recognition of this, the Council is prepared in principle, to reinvest projected revenue savings arising as a capital contribution to the project. Bidders will be invited to explore the level of potential capital contribution with the Council during the competitive dialogue process."
- 3.16 The level of capital contribution was explored with the two shortlisted bidders during Stage 1 dialogue held in early 2015. It was agreed at that time that both bidders could assume a contribution of £8m, and both used this figure for the purposes of their final tenders. An estimated saving of approximately £730k per annum needs to be achieved to ensure the capital contribution can be made by the Council and remain cost neutral within the Medium Term Financial Strategy.
- 3.17 As part of the January 2016 report to the Policy & Resources Committee, in addition to securing agreement to the appointment of Crest Nicholson as preferred developer, the committee "Approved in principle a capital contribution of £8m towards the development of a new public sports and leisure centre funded by forecast operational savings subject to the contribution being cost neutral to the Council."
- 3.18 Subject to the committee's agreement to the Council entering into the DA, and the obligations this places on the Council, it is now appropriate to formalise agreement to the Council's £8m capital contribution. This sum will be raised through borrowing at the appropriate time. Payments to the developer will only be made following the agreement going unconditional (i.e. when the developer has satisfied all conditions). An initial £1m would be paid immediately upon going unconditional to cover design development costs to date, and payments of the remaining £7m would be made against evidence of expenditure on the sports centre and only once the entirety of the HIF Funding has been drawn down and spent by the developer.

Sports Centre Design Development

- 3.19 In embarking on the current project back in 2013 the Council agreed its key priority was the delivery of a high quality public Sports and Leisure Facility, in line with its required specification, in the west of the city. Each of the documents issued during the procurement process emphasised this and the DA includes provisions aimed at ensuring this as the project moves through detailed design stage towards a final scheme.
- 3.20 Among the annexures to the DA are a Sports Centre Specification document and a Sports Centre Design Protocol. The specification builds on the Council's outline specification issued as part of the original procurement, the requirements of which remain unchanged, and incorporates the developer's proposals as set

out in its final tender. The design protocol sets out the agreed process by which the developer will advance the design, in full collaboration with the Council, in order to reach agreement on the detail of the design and specification as the development moves through the RIBA design stages.

- 3.21 The design protocol requires the developer to work up the design, with a particular emphasis on the Sports Centre and other key elements of the development, from the proposals set out in its final tender, for the Council's agreement prior to submission of the planning application.

Parent Company Guarantee and Security

- 3.22 The DA contains security measures necessary to satisfy the Council that Crest will meet its obligation to deliver the agreed Sports Centre, or that if it fails to do so the Council's position would be protected. Firstly, the provision of the leisure centre is covered by Crest parent company guarantee, meaning the Council could enforce against Crest PLC in the event that it breached its contractual obligations.
- 3.23 The DA also contains a mechanism where by the Council will be entitled to register a Land Registry restriction on the developer's overriding leasehold title over the airspace for the whole of a residential block. The developer will not be allowed to dispose of certain numbers of Private Units in that block until specific Sports Centre development milestones have been achieved. This protects the Council in the event of a failure to deliver due to insolvency of the parent company. If this scenario occurred then the Council could then sell the held-back units to fund stepping in to complete the leisure centre itself.

Appropriation

- 3.24 The developer has requested that the Council appropriates the site for planning purposes. Section 203 of the Housing and Planning Act 2016 provides that where land is held for planning purposes and work is done in accordance with planning permission, third-party rights are overridden. Thus an effect of appropriation for planning purposes is to protect the Council and developers from the risk of the development process being stopped once it has started. The rights of third parties whose private interests may be affected by development are protected to the extent that they have a right to compensation against the local authority. The Council, however, will be indemnified against such claims for compensation by the developer. Failure to appropriate the site for planning purposes will jeopardise the development as there would be a risk of delay because of legal proceedings brought by those with third party rights.
- 3.25 The Council's power to appropriate land under s122 of the Local Government Act 1972 is exercisable on determination that the site "is no longer required for the purpose for which it is held immediately before appropriation". At the point of the appropriation the Council will no longer require the site to be used for its current use but will require it to be held for the purposes of development.
- 3.26 If the Committee agrees to recommendation 2.6, the Executive Director for Economy, Environment & Culture will cause the appropriation to take place by signing an appropriation memo.

3.27 The Committee is also asked to authorise the use of the power contained in S203 Housing and Planning Act 2016. S203 is the power which allows the carrying out of building work even if it involves interfering with third party rights. Recent case law suggests there should be transparency when exercising this power; the Council should (where possible) consider the third party rights which will be overridden and ensure steps have been taken to engage with those third parties. The indemnity which the developer is required to sign requires them to provide sufficient information to satisfy the Council that it is appropriate to authorise the use of S203. This report therefore seeks delegated authority to the Executive Director for Economy, Environment & Culture to make the final decision to authorise the use of S203 once he is satisfied that appropriate engagement with third parties has taken place.

Timetable

3.28 Subject to the committee's agreement to the recommendations in this report, the indicative timetable for pre and post planning activities is as follows:

Event	Timescale
1. PRG Committee agreed revised AH provisions and that the DA should be finalised	6 th December 2018
2. Standstill letter issued	24 th December 2018
3. Standstill period deadline	11 th January 2019
4. Parties seek to finalise DA terms	Mid-January 2019
5. Crest Board approval to enter DA	Mid-January 2019
6. Expiry of procurement challenge period (30 days)	23 rd January 2019
7. Secure PRG Committee agreement to enter into DA	24 th January 2019
8. Enter into DA	End January 2019
9. Crest mobilises its design team and commences detailed design process	February 2019
10. Crest prepares Planning Design Proposals for Council agreement as landowner prior to submission of planning application (10 months from entering into DA)	November 2019
11. Planning application submitted (12 months from entering DA)	Feb 2020
12. Planning application determination	Mid 2020
13. DA goes unconditional	Second half of 2020
14. Enabling works and demolition commences	End 2020/Early 2021
15. Construction commences	Early/Mid 2021
16. New public sports and leisure centre completed	2024
17. First residential units completed	2024
18. Development completed	2025/26

4. ANALYSIS & CONSIDERATION OF ANY ALTERNATIVE OPTIONS:

4.1 It was agreed at the previous meeting that the terms of the DA should be finalised such that the DA could be entered into by no later than the end of January 2019. The DA appended to the Part 2 report to this committee, as summarised in the Summary at Appendix 1 to this report, reflects the final position negotiated between the Council and Crest Nicholson.

- 4.2 Should the committee determine that the terms are unacceptable, and in the absence of agreement to an extended period in which to continue negotiations, then the Council would need to terminate the current project and its relationship with the developer. This would necessitate the need to begin the process of considering alternative delivery routes. It is acknowledged that this would result in continuing uncertainty, further significant delay to the project and a much longer timescale to delivering a new King Alfred Leisure Centre when compared to the proposed timetable for continuing with Crest in para 3.28.

5. COMMUNITY ENGAGEMENT AND CONSULTATION

- 5.1 Agreement to the terms of the DA, with the parties entering into it shortly thereafter will secure Crest's agreement to commence the detailed design and consultation process leading to submission of a detailed planning application, and place obligations upon them. Crest proposes three stages of consultation during that 12 month period, a process that will involve residents, users and stakeholder groups, and sports governing bodies. Crest's team fully appreciate the importance of this stage, are experienced in this area, and are committed to ensuring an effective process.

6. CONCLUSION

- 6.1 Entering into the DA marks a very significant milestone, without which the project could not be advanced. The financial challenges have directly led to a 2 year delay to reaching this point. In entering into the DA it is hoped that the developer will immediately mobilise its full team and commit the resources necessary to advance the design within the next 10 months to enable submission of the planning application within 12 months. Reaching that point will require the developer to commit significant sums that will provide tangible evidence of their commitment.
- 6.2 It is important to emphasise however that even if a satisfactory planning permission is achieved, there is a final condition relating to viability and in the absence of a significantly improved financial position, the project may continue to be unviable, with the risk that the scheme ultimately fails. Although the DA enables the agreement to be determined at various stages, upon entering into the DA the Council is committing itself to the scheme for the medium term i.e. in all likelihood at least the next 2 years.

7. FINANCIAL & OTHER IMPLICATIONS:

7.1 Financial Implications:

- 7.1.1 The original scheme proposed by Crest and approved by Policy and Resources Committee in January 2016 included a leisure centre that exceeded the council's minimum specification, delivery of 20% affordable housing and was close to the developers desired profit level of 22.5%. At that time the development appraisal showed a profit of 20.6%. As part of this scheme the council will contribute £8m funded through borrowing with the financing costs of £0.73m per annum being met from revenue savings from a new leisure centre.

- 7.1.2 In August 2017 the development appraisal was reviewed and increased costs identified creating a funding gap. Subsequently a bid was made to the Housing Infrastructure Fund (HIF) on a marginal viability basis for £15.2m reflecting a developer's profit level of 20%. The bid was successful but includes a tight timescale for delivery to ensure the HIF funding remains secured. The council is the accountable body for this allocation.
- 7.1.3 Since the successful HIF bid, Crest has completed a further review of the development appraisal which reflects further cost increases and residential values reducing, including the omission of ground rent income as a result of proposed changes in legislation, creating a further funding gap. This appraisal includes both the £8m council contribution and the £15.2m from HIF and shows a developer profit level of 7.4%, approximately £29m below the 20% profit requirement and is a level that is too low for a commercial developer to proceed.
- 7.1.4 A further detailed assessment of Crest's appraisal has been completed by the council's advisors and is appended to the Part 2 report. This review confirms the costs and value assumptions included in the appraisal are generally within an appropriate range. Therefore for the development to be successful a combination of cost savings and increasing values will be required. If the current appraisal did not include affordable housing then the developer profit would increase to 12.4%, £19m below the 20% profit requirement, which is still below a viable commercial level and therefore Crest will need to identify further cost savings or additional revenues to make the project viable even without affordable housing.
- 7.1.5 The leisure centre specification is assumed to deliver at least £0.73m savings per annum to fund the council contribution and therefore any variation of the specification as a result of cost savings measures will need to be assessed for its revenue impact and compliance with the procurement procedures. Other options include reviewing the number of enabling housing units and or improving the building efficiency.
- 7.1.6 If the Development Agreement is entered into then the council would not be liable for transferring either the HIF funding or the council contribution until the project goes unconditional which is subject to a viability test following a successful planning consent. An initial £1m payment will be made to the developer from the council's contribution once the DA goes unconditional. The remaining £7m will be paid once all the HIF funding is fully utilised subject to evidence of expenditure on the sports centre has been provided.

Finance Officer Consulted: James Hengeveld Date: 15/01/19

7.2 Legal Implications:

- 7.2.1 The principal legal implications are set out in the body of this report and in the previous report to the 6 December 2018 Committee.
- 7.2.2 The Affordable Housing Provisions which have been agreed with Crest following the Committee decision in December are substantially the same as the draft Provisions attached to the December report. The DA has been amended slightly to clarify that the minimum requirement remains at 20% affordable housing

unless the local planning authority determines otherwise. In such circumstances, the developer will be required to explore alternative methods of providing affordable housing either on or off site including the payment of a commuted sum out of profits that exceed a certain threshold; a registered provider purchasing residential units (as affordable housing) using a government housing grant; or the Council purchasing residential units (as affordable housing) at a discounted price using its Housing Revenue Account (“HRA”).

7.2.5 Following the advice of James Goudie QC, a revised standstill letter was sent to Bouygues, the other bidder that had been invited to participate in the final stage of the procurement. That letter was sent by email and post on 24 December 2018. The DA will not be executed before 24 January 2019 to ensure that the risk of challenge from Bouygues has passed.

7.2.6 State aid is potentially capable of becoming an issue through a combination of the £8m Council funding, the HIF grant and the possible purchase of affordable housing through a registered provider and/or the Council’s HRA. A measure does not involve State aid if the funds are made available on the same terms that would be provided in the normal course of events by a private investor applying ordinary commercial criteria (the “market economy operator” or “MEO” principle). The Council and the developer are collating information and relevant documents to show that the MEO principle is satisfied.

7.2.8 Under s122 of the LGA 1972 a council may appropriate land within its ownership that is no longer required for the purpose for which it is held, for any other purpose for which it is authorised by statute to acquire land. The Council is authorised to acquire land by the Town & Country Planning Act 1990 provided that the authority believes that the acquisition will facilitate the carrying-out of development, re-development or improvement on - or in relation to - the land, but a local authority must not exercise the power unless they consider that the development etc. is likely to promote or improve the economic, social or environmental well-being of their area. The reasons why the redevelopment is in the economic and social interests of the area are set out in the body of this report (including para. 3.1). The Council therefore has the power to appropriate the land for planning purposes in order to facilitate the sale and redevelopment.

7.2.10 Under s233 Town & Country Planning Act 1990, the Council is under an obligation to obtain the best consideration reasonably obtainable when disposing of land which has been appropriated for planning purposes. In this case the Council has conducted a full public procurement process and has received advice from Deloitte Real Estate.

Lawyer Consulted:

Alice Rowland

Date: 15/01/19

Equalities Implications:

7.3 There are no specific equalities implications arising from this report, but the provision of sports facilities that are accessible to all sections of the community are important to increase participation and subsequently improve health and well-being.

Sustainability Implications:

- 7.4 The developer will be required to meet the Council's objectives around sustainable development in relation to policies within the City Plan. Sustainability was emphasised in documents issued during the procurement process, was a focus during dialogue and considered as part of the evaluation process, for both the sports and leisure centre element and the wider enabling development. Crest's final tender provided extensive details of its sustainability proposals and these would be taken forward as the design is further developed.

Any Other Significant Implications:

- 7.5 All significant implications are dealt with in the body of the report.

SUPPORTING DOCUMENTATION

Appendices:

1. Summary of DA

Part 2 Appendices:

1. Full Development Agreement (excluding Annexures)
2. Deloitte LLP Appraisal Review report

Documents in Members' Rooms

None

Background Documents

1. Policy & Resources Committee report 11 July 2013
2. Policy & Resources Committee report 21 January 2016
2. Policy Resources & Growth Committee report 6 December 2019

APPENDIX 1

Summary of the Development Agreement

The key provisions of the agreement to be entered into between the Council and the Developer for the development of the King Alfred site, Kingsway, Hove, East Sussex (the "**Agreement**") are set out in the table below. All capitalised terms have the meaning given in the Agreement unless otherwise defined.

A copy of the agreed form Agreement is attached as Appendix 1 to the Part 2 report to this committee.

Provision	Summary	Clause reference
Conditions	<p>Obligations on the Developer to construct the Development are conditional upon all Conditions being satisfied (or waived) on or before the date 24 months from the date of the agreement (as such date may be extended in accordance with the Agreement) (being the "Conditions Long Stop Date") and in any event by the date 30 months from the date of the Agreement (being the "Ultimate Conditions Longstop Date").</p> <p>Conditions:</p> <ul style="list-style-type: none">(a) the Planning Condition;(b) the Stopping-Up Condition;(c) the Other Consents Condition;(d) the Appropriation Condition;(e) the Viability Condition; and(f) the HIF Funding Condition. <p><u>Planning Condition</u></p> <p>This shall be satisfied on the date that a Satisfactory Planning Permission (Free from Challenge) has been granted free of any Council's Unacceptable Conditions and free also from any Developer's Unacceptable Conditions.</p> <p><u>Stopping-Up Condition</u></p> <p>This shall be satisfied by the stopping-up (Free from Challenge) of any highways shown in the Satisfactory Planning Permission.</p> <p><u>Other Consents Condition</u></p> <p>This shall be satisfied when the Developer notifies the Council that all consents required to construct Development in accordance with statute and the requirements of any competent authority have been obtained. (This excludes planning permission and any requisite stopping-up order, which are stand-alone Conditions).</p> <p><u>Appropriation Condition</u></p> <p>This shall be satisfied by the Council (as local authority) appropriating</p>	3

the Site (Free from Challenge).

Viability Condition

The Developer has a single opportunity to test viability of the Development on the date 10 working days following the satisfaction (or waiver) of all other Conditions (this is the "**Valuation Date**").

Within 10 working days of the Valuation Date the Developer is to provide the Council with the Financial Appraisal and notice confirming: (a) the Viability Threshold has been met; or (b) the Viability Threshold has not been met (with supporting justifications). If the Developer fails to provide the Financial Appraisal within the requisite 10 working days the Viability Condition is automatically deemed satisfied.

If the Viability Threshold is not met the Developer must serve a standstill notice or waive the Viability Condition.

Where a standstill notice is served there will be a suspension of the Conditions Long Stop Date and Ultimate Conditions Longstop Date. This suspension will continue until the earlier of: (a) service by the Developer of a notice to end the suspension; and (b) the date 6 months from the start of the suspension. This period of suspension is the "**Standstill Period**" and the Conditions Long Stop Date and Ultimate Conditions Longstop Date will be extended by the same number of days as the Standstill Period.

The Developer is to re-run the Financial Appraisal prior to the expiry of the Standstill Period and confirm to the Council whether or not the Viability Threshold is now met. If the threshold is not met either party can terminate the agreement. If the Developer fails to provide the Financial Appraisal prior to expiry of the Standstill Period the Viability Condition is treated as waived by the Developer.

HIF Funding Condition

This will be satisfied following:

- (a) completion of the agreement (in a form approved by both the Council and the Developer) to be entered into between the Council and Homes England for the unconditional provision of marginal viability funding to the Council (the "**HIF Funding Agreement**"); and
- (b) completion of the deed of indemnity for the HIF Funding Agreement (pursuant to which the Developer shall indemnify the Council for the repayment of sums under the HIF Funding Agreement on a termination of the Agreement).

It is accepted by the Council and the Developer that the HIF funding can be used (or contracted to be used) on or by 31 March 2021 (or such revised date as is agreed by Homes England).

The parties are to assist each other in good faith to conclude the negotiation of the HIF Funding Agreement with Homes England and to satisfy the HIF Funding Condition as soon as reasonably practicable and in any event by the date 3 months from the date of the Agreement (or such later date as the Council and Developer may agree).

Planning Design (pre-planning)	The Initial Approved Scheme constitutes the base documents to be developed for the purposes of finalising the Planning Design Proposals.	4.1 to 4.12
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Clause 4 of the Agreement is to be read in conjunction with the Sports Centre Design Protocol (in the event of conflict between the Agreement and the Sports Centre Design Protocol, the provisions of the Agreement shall prevail). Where either party is asked to consent or approve to any matters the subject of the Sports Centre Design Protocol or clause 4, such approval shall be considered in good faith and shall not be unreasonably withheld or delayed.

Planning Design Proposals (pre-planning)

As soon as reasonably practicable after the date of the Agreement (and in any event within the timeframes stipulated in the Sports Centre Design Protocol) the Developer will diligently, expeditiously and fully engage, liaise and work with the Council to work up the Planning Design Proposals in accordance with the Sports Centre Design Protocol.

The Developer shall submit the Planning Design Proposals to the Council for review and approval by no later than the date 10 months from the date of the Agreement (or such longer date as the parties may agree) (being the "**Initial Submission Date**") and shall procure that the Planning Design Proposals include the Remaining Design Details and Council Choice Items available at that time (in accordance with the Sports Centre Design Protocol) and all applicable detailed design information and documentation for the Basement Works and Key Elements for Council to approve the Planning Design Proposals.

The Developer is to use all of its reasonable endeavours to ensure that the Planning Design Proposals are consistent in all material respects with the Initial Approved Scheme and is to seek the Approval of the Council where amendments or variations to the Initial Approved Scheme (as part of working up the Planning Design Proposals) are required.

If prior to the submission of the Application the Council requests changes to the Sports Centre Specification and/or Planning Design Proposals which result in the total cost of delivery of the Sports Centre exceeding the Sports Centre Base Cost, then the Developer shall seek to value engineer other elements of the design of the Sports Centre (as first Approved by the Council) to bring the total cost of delivery of the Sports Centre back within the Sports Centre Base Cost.

Where the Developer is obliged to submit revised Planning Design Proposals or Final Approved Scheme (as applicable) to the Council for Approval it shall do so as soon as reasonably practicable and the Council shall give such Approvals as soon as reasonably practicable.

The Planning Design Proposals shall be deemed to be Approved by the Council if the Council does not respond within 20 working days of receipt.

Planning Application	The Application must comply with the Planning Design Proposals approved by the Council.	4.13 to 4.30
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The Developer shall submit the Application to the local planning authority ("**LPA**") by the date 12 months from and including the date the Agreement (or such later date as the parties may agree) (or if the Council has not approved the documentation by such date, within 5 working days of the Council's approval) (being the "**Final Submission Date**").

Where the Developer pursues or contests any Proceedings it shall do so promptly and diligently and at its own cost but the Council shall (at the proper and reasonable cost of the Developer) provide such assistance and support as the Developer reasonably requires.

The Developer is to enter into Planning Agreement(s) where required by the LPA and is to use all its reasonable and commercially sensible endeavours to negotiate and conclude the terms of Planning Agreement(s) as quickly as reasonably possible.

Within 15 Working Days from the grant of a Permission the Developer shall notify the Council whether the Permission contains any Developer's Unacceptable Conditions and the Council shall notify the Developer whether the Permission contains any Council's Unacceptable Conditions with (if applicable) reasons why in any instance it is not considered to be a Satisfactory Planning Permission.

Final Approved Scheme (post submission of Application)	Within the timeframes stipulated in the Sports Centre Design Protocol 4.33 to 4.39 the Developer will diligently, expeditiously and fully engage, liaise and work together with the Council in accordance with the Sports Centre Design Protocol to enable the Council to be properly apprised of the detailed content of the Final Approved Scheme.
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By no later than 6 months from the designation of a Satisfactory Planning Permission the Developer must submit the Final Approved Scheme to the Council for its review and Approval (giving the Council not less than 10 working days to review and comment on the Final Approved Scheme). Once approved, the Final Approved Scheme shall not be varied without the Council's consent.

The Final Approved Scheme issued to the Council for Approval is to address all applicable Remaining Design Details and Council Choice Items (in accordance with the Sports Centre Design Protocol).

In formulating the Final Approved Scheme the Developer and the Council shall use reasonable and commercially sensible endeavours to ensure that any additions to the Remaining Design Details and/or the Council's Choice Items will not result in the total cost of delivery of the Sports Centre exceeding the Sports Centre Base Cost (the Developer shall not be obliged to accept additions to the Remaining Design Details and/or the Council's Choice Items which result in the estimated cost of delivering the Sports Centre exceeding the Sports Centre Base Cost).

Extension of Conditions Longstop Date	The Agreement provides a mechanism for extensions to the Conditions Long Stop Date (save that no extension can go beyond the Ultimate Conditions Longstop Date) where on the Conditions Longstop Date:	4.31 to 4.32
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(a) Proceedings or any Judicial Review Period have commenced

but not determined;

(b) the LPA (or Secretary of State) has yet to determine or re-determine the Application or has resolved to issue a Permission subject to completion of an outstanding Planning Agreement;

(c) the parties await a decision of the Expert;

(d) the parties agree with Homes England that the HIF Funding will need to be utilised by a date that is later than 31 March 2021; or

(e) a Procurement Challenge is instigated.

Affordable Housing Nothing in the Agreement is to be construed as requiring the Council 4.2, 4.19 and to give its approval to an Affordable Housing Shortfall and the Council 4.40 to 4.51 is not required to approve any part of the Application that relates to the allocation of Affordable Housing.

Prior to submission of the Application the Developer will seek guidance from the LPA (which the Council will also request from the LPA in conjunction with the Developer) to enable the Developer to understand the likely Affordable Housing Shortfall.

The Developer agrees that it shall provide 20% of total Residential Units as Affordable Housing unless such percentage is varied or modified by the LPA.

If the Affordable Housing Percentage is less than 20%:

Within 10 working days of the earlier of: (a) completion of the first sale by the Developer of 98% of the total number of Residential Units; or (b) such other date as may be required by a Planning Agreement, an AHVR shall be carried out to determine if there is an Affordable Housing Super Development Profit.

If an Affordable Housing Super Development Profit exists the following provisions apply and operate sequentially:

(a) the Developer shall (in accordance with the Planning Agreement, or otherwise) pay to the Council a sum calculated using the following formula:

$$A = B \times C$$

Where:

A = the First Alternative Commuted Sum

B = the difference in market value between each habitable Private Unit and each comparable habitable Affordable Housing Unit

C = the number of Private Units nominated by the Developer ("Nominated Units") which if designated and delivered as Affordable Housing, as part of the Affordable Housing Percentage, would reduce the Affordable Housing Shortfall to zero

and,

(b) where a balance of Affordable Housing Super Development Profit remains:

(i) a sum equal to a maximum of 2.5% of the Projected Sales Proceeds pursuant to the terms of the Revenue Overage Deed shall first be paid to the Developer; and

(ii) any final remaining balance shall be split between the Developer and the Council in accordance with the Revenue Overage Deed.

Notwithstanding the above, the Developer may in its discretion seek an alternative arrangement ("**Affordable Housing Shortfall Alternative**") to the Developer's obligations set out at (a) and (b) above.

The Affordable Housing Shortfall Alternatives envisaged by the Agreement are:

1. The Developer (as and when required by the Council) contacting at least one registered provider of Affordable Housing to agree and settle that the registered provider takes an allocation of Affordable Housing on the Site amounting to a maximum of 20% of the aggregate number of Residential Units.
2. The Council deciding (in its absolute discretion) to add to its Affordable Housing stock and purchase a number of Private Units ("Additional Units") which if delivered as Affordable Housing would reduce the Affordable Housing Shortfall to zero (to allow the Affordable Housing Viability Threshold to be achieved).

If the parties agree an Affordable Housing Shortfall Alternative the outcome is to be recorded in a Planning Agreement (or separate collateral agreement between the parties and the LPA). The provisions of such agreement shall then supersede the above Affordable Housing provisions.

Council's
Contribution
and HIF
Funding

An initial £1,000,000 out of the Council's Contribution is payable to the Developer 10 working days following the later of (a) the satisfaction (or waiver) of all the Conditions, and (b) six months from and including satisfaction of the Viability Condition (or, if the Viability Condition is waived by the Developer, six months from and including 10 working days after the remainder of the Conditions have been satisfied) (strand (b) being the "**Vacant Possession Date**" and strand (a) and (b) together being the "**Contractual Start on Site Date**"). This initial payment is to compensate the Developer for the planning, professional and other fees incurred by the Developer prior to the date of the Agreement. The remainder of the Council's Contribution is payable once the entirety of the HIF Funding has been drawn down and paid to the Developer.

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The Developer is to serve a Development Advance Request on the 5th working day each calendar month (with the first request being made on the date identified in the Payment Schedule linked to the Programme). Each Development Advance is to be paid from the Escrow Account within 10 working days of a Development Advance Request.

Sums payable from the Escrow Account out of the Council's Contribution shall be capped at the value of the works and Development Costs incurred for the previous calendar month.

Sums payable from the Escrow Account out of HIF Funding are capped at the sum of: (a) the value of the works and Development Costs incurred for the previous calendar month; and (b) the Developer's reasonable and proper estimate of contracted costs it is likely to incur the following month.

The sum requested in a Development Advance Request is to be certified by the Employer's Agent and the Agreement contains a mechanism for the Council to challenge the sum requested in a Development Advance Request.

The parties accept and agree that clause 5 of the Agreement may need to be varied to synchronise it with the agreed form HIF Funding Agreement.

Termination The Council or the Developer can determine the Agreement where: 7, 41 and 42

(a) the Initial Submission Date and/or the Final Submission Date has not been met;

(b) the HIF Funding Condition has not been satisfied by the by the date 3 months from the date of the Agreement (or such later date as the Council and Developer may agree);

(c) the Conditions have not been satisfied or validly waived by the Conditions Long Stop Date or the Ultimate Conditions Longstop Date;

(d) the Viability Condition has not been satisfied following the expiry of a Standstill Period;

(e) the Developer receives a Refusal and does not wish to pursue Appeal Proceedings due to advice by leading planning counsel that the chances of a Satisfactory Planning Permission being issued are not more than 50%; and/or

(f) any Procurement Challenge is made against the Council within the Procurement Challenge Period.

The Council may determine this Agreement where:

(a) the Practical Completion Date has not occurred on or before the Target Works Completion Date or the Ultimate Works Completion Date.

The Council may also determine the Agreement where:

(a) the Developer is insolvent; or

(b) the Developer is in persistent and material breach of the Agreement and:

(i) (in the case of a material remediable breach) fails within a reasonable period specified by the Employer's Agent to commence and remedy the breach; or

(ii) (in the case of a material irremediable breach) fails to pay proper compensation within a reasonable period specified by the Employer's Agent,

with each of such instances constituting an "Event of Default".

Environmental	The Council is responsible for any third party claim relating to Hazardous Substances at the Site or escaping from the Site on or before the grant of the overriding lease to the Developer (save where such claim arises following the act or omission of the Developer). Environmental development risk otherwise sits with the Developer.	9.6
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Assignment	Neither party can assign or otherwise transfer its interest in the Agreement, save that the Developer can: (a) grant a charge as security for the purposes of securing financing for the Development; (b) assign to an entity that the Developer retains a controlling interest in.	10
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Provision of Information	The Developer is to provide the Council with an up-to-date Financial Appraisal on a six monthly basis following exchange.	13
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Developer's Variations	Variations which have an adverse effect on the Sports Centre and are not consistent with the Final Approved Scheme or alter the Sports Centre following settlement of the Final Approved Scheme require the prior approval of the Council (such approval not to be unreasonably withheld or delayed). The Developer does not need to obtain the Council's approval for the substitution of unavailable materials with materials of an equal (or better) performance, durability and quality by a similar (or the same) manufacturer and on the same warranty terms or for variations required by a mandatory change of law.	14
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Council's Variations	The Council may submit a Variation Request following settlement of the Final Approved Scheme up to the first anniversary of the Contractual Start on Site Date. Following a Council variation request the Developer shall consult with the Consultants and issue notice to the Council confirming if the request is approved or refused. If approved, the Developer will confirm the anticipated variation cost and impact upon the Programme for the Sports Centre.	15
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The Developer is not to be deemed acting unreasonably where it refuses a variation request because:

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- (a) Consent for the variation is unlikely to be obtainable;
 - (b) the variation would have an adverse effect on any other part of the works for the Sports Centre; and/or
 - (c) the variation would be in contravention of statute, code of practice or good building practice or would adversely affect the health and safety of any person.

The Council is to pay the Developer's reasonable costs properly incurred in considering a Variation Request and issuing a response to such request (irrespective of whether the Developer accepts or refuses the request and the Council elects to proceed with the requested variation).

The Council is to pay the total costs arising from the implementation of a Council's Variation (as certified by the Employer's Agent) together with a management fee of 4% of the amount of the construction costs incurred by the Developer in carrying out and completing any Council Variation.

The Council shall be bound by any extensions of time given to the Building Contractor as a result of a Council Variation and the Target Works Completion Date shall be extended by the period of time required to implement a Council Variation (as certified by the Employer's Agent).

Intellectual Property	On termination of the Agreement the Council is to receive the benefit of all plans, drawings and specifications produced as a result of the Agreement and shall be granted an irrevocable licence to freely transfer the benefit of such information.	16
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Contractors, Consultants and Sub-Contractors	<p>The Developer is to deliver to the Council:</p> <ul style="list-style-type: none"> (a) a certified copy Building Contract and the Contractor's Warranty within 10 working days of the completion of the Building Contract; (b) a certified copy Appointment and the applicable Consultant's Warranty within 10 working days of the completion of each Appointment; and (c) a certified copy sub-contract and the applicable Sub-Contractor's Warranty within 10 working days of the completion of each sub-contract. 	18
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Vacant Possession and the grant of the Leases	<p>The Council is to deliver up vacant possession of the Site on or before completion of the overriding lease of the Site (to be granted by the Council to the Developer) and the head lease of the Sports Centre.</p> <p>The leases are to be granted 10 working days following the Contractual Start on Site Date (as defined above).</p>	19
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Construction and Delay	The Agreement contains standard obligations as to construction of the Sports Centre by the Developer and the Council's monitoring of construction.	20 to 31

The Developer is to achieve practical completion of the Sports Centre by the Target Works Completion Date and in any event by no later than the Ultimate Works Completion Date.

Upon exchange of the Agreement the Target Works Completion Date is 42 months from and the Ultimate Works Completion Date is 54 months from the Contractual Start on Site Date.

The Target Works Completion Date is extendable in instances of any Relevant Events by such period as may be agreed between the parties provided that the Council shall be deemed to approve any extension of time permitted or agreed under the Building Contract (and certified by the Employer's Agent).

The "Relevant Events" are:

- (a) force majeure or any other event beyond the control of the Developer, Contractor or Consultants;
- (b) the inability of the Developer to source materials and/or labour as a result of the impact of the rules and regulations imposed by HM Government and/or the remainder of the EU from time to time in anticipation (and as a result) of the UK's departure from the EU;
- (c) loss or damage occasioned by one or more of the specified perils defined in the Building Contract or one or more of the Insured Risks;
- (d) any event act or negligence which would entitle the Contractor to an extension of time under the Building Contract (save where due to default of the Developer);
- (e) delay caused by any act or omission of the Council which has an adverse impact on the key dates in the Programme; and/or
- (f) delay caused by the Council wrongly challenging the Developer on whether the Sports Centre and/or Public Realm Works have been constructed in accordance with the Agreement (as contemplated by clause 30.3 of the Agreement).

Liquidated Damages	<p>Where practical completion of the Sports Centre does not occur by the Target Works Completion Date due to a Relevant Event of the type specified in paragraphs (a) and (c) and (d) above then the Council shall be entitled to receive from the Developer damages (calculated on a daily basis) using the following formula:</p> $A = B \times C$ <p>where:</p> <p>A = liquidated damages payable;</p> <p>B = £750 per day (increased in line with indexation at 3.0% per annum);</p> <p>C = is the number of days from and including the Target Works Completion Date to and including the actual practical completion date of the Sports Centre.</p>	58
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Insurance	<p>From the Contractual Start on Site Date up until practical completion of the Sports Centre the Developer is to maintain (or (if appropriate) procure that the Contractor maintains):</p> <p>(a) insurance of the Sports Centre and the Public Realm Works and the remainder of the Development for the Full Reinstatement Cost under an all risks insurance policy (with the interest of the Council as landowner noted on the policy or policies of insurance);</p> <p>(b) insurance against offsite damage not recoverable from the Contractor; and</p> <p>(c) insurance against public liability in the sum of not less than twenty (20) million pounds for each and every claim.</p> <p>The Developer is under an obligation to use all reasonable endeavours to reinstate damage or destruction to the Sports Centre and the Public Realm Works by the Insured Risks.</p>	32 and 33
Practical Completion	<p>Provisions are included to deal with certification practical completion of the Sports Centre with the Council having the ability to oversee the process.</p>	37
Defects	<p>The defects liability period is to run for 12 months from practical completion of the Sports Centre.</p> <p>The Developer is responsible for Defects arising during this period and provisions are included to deal with the issue of the certificate of making good Defects with the Council having the ability to oversee the process.</p>	37
Disputes	<p>Any dispute shall be referred for determination by a person qualified to act as an independent expert or an arbitrator.</p>	45
Interest	<p>Where either party fails to pay within 5 Working Days of the due date monies payable under the Agreement interest shall accrue daily at 3% per annum above the base rate of National Westminster Bank plc.</p>	48
Restriction on sale of Residential Units	<p>The Council shall be entitled to register a Land Registry restriction on the Developer's overriding leasehold title over the airspace for the whole of a residential block (such block initially being that known as "Block A2") as follows:</p> <p><i>"No disposition of the registered estate by the proprietor of the registered estate is to be registered without a written consent signed by Brighton & Hove City Council or, if appropriate, signed on its behalf by its conveyancer."</i></p> <p>The Developer shall not dispose of the following numbers of Private Units in Block A2 until the following Sports Centre development milestones have been achieved:</p> <p>(a) the Developer shall not dispose or agree to dispose any Private Units within Block A2 until the occurrence of the Sports Centre Commencement Date (verified in writing by the Employer's Agent), at which point the Council shall release to the Developer executed Land</p>	60

Registry Form RX4s in respect of 41 Private Units;

(b) following the occurrence of the Sports Centre Commencement Date, the Developer shall not dispose or agree to dispose more than 41 Private Units within Block A2 until completion of the "shell and core" works to the Sports Centre (certified in writing by the Employer's Agent), at which point the Council shall release to the Developer executed Land Registry Form RX4s in respect of 21 Private Units;

(c) following the completion of the "shell and core" works, the Developer shall not dispose or agree to dispose the remaining Private Units within Block A2 until practical completion of the Sports Centre, at which point the Council shall release to the Developer the executed Land Registry Form RX4s in respect of the remaining Private Units.

There is a mechanism for the Developer to on one occasion substitute Block A2 for another equivalent block within the Development.

Specified dispositions are carved out of the sales restriction and the Council is to provide the Developer with the requisite consent letter or RX4 (as applicable) in respect of any such exempt disposition within 5 working days of a request from the Developer.

The Developer is entitled to request the Council to accept an alternative form of security being either a bank guarantee or bond (which in both instances will be an on demand instrument issued by a recognised UK clearing bank or financial institution pre-approved by the Council (acting reasonably)).
