

Decision Maker: Executive

For Pre-decision scrutiny by:
Environment PDS Committee on 7th June 2016 and
Executive and Resources PDS Committee on 8th June 2016

Date: 15th June 2016

Decision Type: Non-Urgent Executive Non-Key

Title: CHISLEHURST RECREATION GROUND – PAVILION LEASE

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Ward: Chislehurst

1. Reason for report

This report seeks consent to grant a 25 year lease to FC Elmstead of part of Chislehurst Recreation Ground. The report also asks Members to agree on the approach for accepting a grant from the Football Foundation to enable the construction of a new pavilion building at this location, as well as agreeing to accept the conditions associated with this grant.

2. RECOMMENDATION(S)

2.1 The Executive is asked to agree to Option 2 in this report and approve:

- 2.1.1 The granting of a 25 year lease to FC Elmstead for part of Chislehurst Recreation Ground, on terms to be agreed by Strategic Property;
- 2.1.2 The acceptance of a grant from the Football Foundation to be solely awarded to FC Elmstead to assist in funding the construction of the new pavilion at this location.
- 2.1.3 The acceptance of the legal conditions associated with the award of the grant to the club, including a legal charge upon the club's leasehold title of the pavilion and a restriction upon the Council's freehold title of the pitches, during the 21 year Clawback period.

Corporate Policy

1. Policy Status: Existing Policy.
 2. BBB Priority: Quality Environment.
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Financial

1. Cost of proposal: No Cost
 2. Ongoing costs: Not Applicable
 3. Budget head/performance centre: N/A
 4. Total current budget for this head: N/A
 5. Source of funding: N/A
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Staff

1. Number of staff (current and additional): N/A
 2. If from existing staff resources, number of staff hours: N/A
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Legal

1. Legal Requirement: Non-Statutory - Government Guidance. Section 123 Local Government Act 1972 (section 123 LGA)
 2. Call-in: Applicable
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Customer Impact

1. Estimated number of users/beneficiaries (current and projected): Members of FC Elmstead, Friends of Chislehurst Recreation Ground, café users, and other associated park users – estimated at in excess of 10,000 visits per year.
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Ward Councillor Views

1. Have Ward Councillors been asked for comments? Yes
2. Summary of Ward Councillors comments: Ward Councillors are supportive

3. COMMENTARY

- 3.1 FC Elmstead (the club), one of the Council's Delegated Sports Managers for parks and open spaces, is seeking to enhance sporting facilities at Chislehurst Recreation Ground.
- 3.2 The club was established in the late 1950's and now has 300 members and a Football Association (FA) Charter Standard.
- 3.3 The FA has previously indicated to the club that they would be supportive of improvements to the pitches and clubhouse at Chislehurst Recreation Ground. The club currently has a Delegated Management Agreement (DMA) from the Council to use these facilities.
- 3.4 In 2015, following ground levelling and pitch drainage works carried out with the support of £47,000 grant funding from the Premier League & The FA Facilities Fund (delivered by the Football Foundation), together with additional funding from the Council and the Chislehurst Playing Fields Association (CPFA), the newly restored pitches were launched.
- 3.5 In order to retain and grow the club's activities (as per its Football Development Plan), a new modern clubhouse is also required that complies with current FA standards. The existing pavilion is in a poor condition and not fit for purpose, and so it is proposed that a new clubhouse is built. This will comprise two changing facilities with showers and toilets, a club room (which will be used/hired for activities and meetings by associated users of the park), a café space (which the club wishes to have the option to sub-let, subject to variation of their existing planning permission) with associated male and female accessible toilets, and storage which will also be used by the local Friends Group. The club secured planning permission for the redevelopment (reference 14/04436/FULL1) in March 2015.
- 3.6 The club has estimated that the total cost of the improvement works will be in excess of £360,000 including contingency, professional fees and VAT. It has been successful in securing a number of external grants from a variety of partners to realise this vision, as well as contributing some of its own funds, as below:

Source of funding	Amount
Football Foundation	£258,865
Chislehurst Playing Fields Association	£50,000
Chislehurst Society	£20,000
London Marathon Charitable Trust	£19,999
FC Elmstead	£15,000
Total	£363,864

Terms and Conditions of the Football Foundation Grant of £258,865

- 3.7 The grant of £258,865 secured from the Premier League & The FA Facilities Fund (paid via the Football Foundation) has a number of conditions attached to acceptance of the monies. One of which requires recipients to have sufficient tenure of the land where the Football Development Plan is to be delivered. The DMA currently held by the club for the grass pitches does not satisfy this condition, i.e. the Council could, in theory, stop the club using the pitches in future, thereby significantly reducing the effectiveness of the pavilion as a hub for sporting activities.
- 3.8 In view of this, the Football Foundation has advised that there are two possible ways of accepting the grant and enabling the pavilion to be built. Option 1 involves the Council, as owners of the Recreation Ground, being a joint applicant with FC Elmstead (who would have a

lease of the pavilion land and a licence for the pitches), whilst Option 2 involves FC Elmstead being a sole applicant and taking a lease of the pavilion land which would include a right to use the sports pitches.

Option 1 - Joint Delivery

- 3.9 If the Council becomes a joint applicant with FC Elmstead, the funder's requirements for security of tenure would be met. In this scenario, the club would be granted a 25 year full-repairing lease of the land where the new pavilion would be built (see Plan 1) and a separate 25 year licence for the sports pitches (see Plan 2).
- 3.10 As joint applicants, the club and the Council would both be jointly and severally responsible for meeting the Terms and Conditions of the grant throughout the Clawback Period of 21 years (from the date of acceptance of the grant). If the specified terms and conditions could not be adhered to, there is a risk that the club and Council may need to pay back a proportionate amount of the grant awarded, based upon the amount of time that has elapsed since the money was awarded. Members should note that, the Council has already signed up to these terms and conditions regarding the on-site pitch improvement project, in 2013, which also had a Clawback Period of 21 years.
- 3.11 In this scenario, the club would carry out procurement of the build themselves, with grant monies going in directly into the club's own bank account in phased stages as the work progresses.

Risks

- 3.12 Strategic Property has reviewed the contract specification drawn up for the club by their appointed Chartered Surveyor and, when comparing to usual Council specifications, has identified a number of potential risks if the project was jointly awarded, and therefore the Council would be jointly liable for the build. These include:
- The Council has not seen a full Project Budget build-up for this scheme and is unable to comment whether the allocation of costs are fair and reasonable.
 - This project is at a stage where the Building Contractor is ready to be appointed. The Council has not been party to the procurement of the consultants or contractors, and would therefore inherit any problems that arise from mistakes made on site.
 - The presence of variables within the contract specification, which could ultimately result in the potential for tenders not being returned and analysed on a like-for-like basis.
 - Risks on allocated Contract Sums – provisional sums may be inadequate. Question mark over who would fund any balance, bearing in mind that there is a limited contingency and no additional funds available from current funders/Club.
 - The potential for the specification to change as the build proceeds, due to the lack of a full traditional specification and drawings.
 - A Construction Contingency sum of £15k has been set aside. Typically Cost Consultants advise on 10% which would be £26k
 - It is unclear whether an over-arching Project Contingency has been allowed for. This is normally set aside to expend on matters outside the construction contract e.g. surveys or investigations not currently identified. Typically Project Managers would set aside 10% of the budget for this.

- Within the existing Tender documentation an allocation of £1m has been given to 'Contractors Insurance (injury to person or property)'. The Council would usually advise a minimum of £5m on a scheme of this value.
- The need for inclusion of several site-based surveys to identify any potential risks to delivery - Asbestos Refurbishment and Demolition survey; Unexploded Ordnance Survey (desktop study); Bat survey; Contaminated Land survey; Soil Sampling survey (borehole) for Foundation Design, costing in total circa £5k
- The fact that the build design does not meet the quality of the Council's usual build specification, e.g. no references to British Standards.
- The club still has a number of conditions to discharge from a Planning perspective e.g. soakaways and screening (whilst the Specification states this is the responsibility of the contractor to discharge, it is not clear if they have understood this and made suitable allowances within their tender).
- The need to ensure the Chartered Surveyor engaged by the club has an appropriate level of Professional Indemnity insurance in place.
- No clear direction or understanding on who would be the client under CDM 2015 Regulations.
- The fact that if there was failure with the building over the 21 year Clawback period, the club and the Council would be jointly responsible.

3.13 From a construction perspective, on the basis that the Council had not been involved in the generation of the design and contract specification (Stage 4 RIBA has already been completed by the Chartered Surveyor engaged) and that, in part, it does not meet existing London Borough of Bromley specification guidelines, officers would favour the club being a sole recipient of the grant, delivering the project on its own, and being responsible for any associated risks. Members will note past experience associated with the Castlecombe Children and Family Centre project that opted for the use of an external consultant who designed and managed the scheme from inception to completion. Full responsibility was delegated to this company with no input from the Local Authority. Poor quality workmanship during the build process led to significant inherited building defects within a 5 year period. As a consequence, the Council has now been forced to fund the rebuild of this facility at significant cost. A legal dispute is on-going with the consultant.

Mitigation

3.14 If Option 1 was selected, a number of measures would need to be put in place to attempt to mitigate some of the risks identified:

Project Manager: Whilst the club would employ a Project Manager from the professional fees available within the grant, the Funder has advised they will not be able to also act on behalf of the Council. Therefore, the Council may wish to employ their own Project Manager for the duration of the build, costing around £9k. However, the Project Manager would have no remit to advise or alter the build, unless the Council was named as a joint developer on the contract.

Ground Surveys: As above, officers have advised that a number of surveys should be carried out to identify any potential risks to the construction the pavilion in terms of timescales and budget. These may potentially be able to come from the professional fees within the grant application, but if this was not possible, they would need to be funded by the Council at a cost of c£5k.

Insurance: Officers are currently seeking advice from the Council's Insurance Team regarding any cover that could be potentially taken out to indemnify the Council against any risks.

- 3.15 A sub-agreement between the club and the Council would be necessary to ensure that each party is aware of its responsibilities within the grant delivery and Clawback Period. The Council would also seek an indemnity from the club in respect of any liability which is outside of its control. However, Members should be aware that the terms and the conditions of the grant (the fact that the Council will be jointly and severally liable for these) will override this and that if the Council did need to pursue any losses against the club, it may not be sufficiently solvent to cover any such losses, particularly if the club is registered as a limited company as is currently proposed (rather than operating through four named individuals as trustees on the lease), so recovering any monies the Council has to pay out, may not be possible.
- 3.16 Members should note that whilst the above measures would seek to reduce some of the highlighted risks, they would not completely eliminate them, due to the fact that the specifications for the proposed works has already been agreed and the procurement process already started, leaving little room for change.
- 3.17 As well as the risks outlined above, Members should note the Terms and Conditions also outlined in 3.25 would still apply in both Options.

Option 2 – Sole Delivery

- 3.18 Alternatively, the Football Foundation have indicated that their requirements for security of tenure could be met if a 25 year full-repairing lease to the club for the new pavilion was granted (as per Plan 1) and that this included a right to use the pitches for the duration of the term (area shown on Plan 2), together with a right to access the land from the public highway. The lease would retain a right of access for the public at all times when the club is not playing matches or training. The lease would also contain all of the relevant clauses around the maintenance and use of the pitches, as would normally be contained within a licence, which would no longer be needed. The grant could then be issued solely to the club.
- 3.19 Under this option, the club would be solely responsible for fulfilling the terms and conditions of the grant and therefore be solely liable for the any risks associated with the construction of the pavilion and its on-going use etc.

Risks

- 3.20 Option 2 reduces the Council's flexibility for its future use of the Recreation Ground as there would be no break clause in the 25 year lease, which would include a right to use the sports pitches (as opposed to the 25 year licence mentioned in Option 1).
- 3.21 As a sole applicant, if the club/their contractor do not finish building the pavilion, Council officers will need to evaluate the position and work with the club and the Football Foundation to ascertain a way of completing the project. Members would also be kept informed during this time.

Mitigation

- 3.22 If this option was selected by Members, a number of measures would be put in place to mitigate against some of the risks identified:

Ground Surveys: Officers would still recommend that appropriate surveys as outlined in 3.12 are carried out by the club to help them reduce risk to the delivery of their project.

Performance Bond: Officers would recommend that the club take out a performance bond to the value of 10% of the works which would provide some insurance indemnity against contractor failure.

Project Manager : As the club would be the sole grant recipient, officers recommend that separate Project Manager is not employed by the Council, in addition to the club's, but the building is, in effect, signed off via the Building Control process. However, The Landscape Group, as providers of the Council's wholly managed and commissioned parks service, will continue to work with the club throughout the project to ensure that the club are delivering as per the project plan timescales and are liaising with the Funder (including submitting grant claims) at the appropriate intervals.

Construction Period: If compatible with the terms of the grant it is expected that the Club would construct the pavilion under the terms of an agreement for lease containing appropriate conditions to safeguard the Council's position, prior to the grant of the lease. However, if the grant conditions require the lease to be granted before any funding is released the lease will contain provisions and requirements relating to the construction period to safeguard the Council's position as much as possible.

Sole Delivery: If there is any failure with the building during the 25 year term of the lease, the club would be solely responsible for dealing with the issue.

Insurance: Officers are currently seeking advice from the Council's Insurance Team regarding any cover that could be potentially taken out to indemnify the Council against any risks.

3.23 As well as the risks outlined above, Members should note the Terms and Conditions also outlined in 3.25 which would still apply in Option 2

3.24 In light of the risks highlighted in 3.12, officers would, on balance, recommend Members to agree Option 2, where the club is the sole applicant and recipient of the grant, and responsible for delivering the project themselves. Members should note however, that even if the club is the sole recipient of the grant, the Council, as landowner, will still have to comply with some of the terms and conditions of the grant as listed in 3.25 below.

3.25 Council Members can view the Terms and Conditions related to acceptance of the grant from the Football Foundation at Appendix 1. In particular, Members should note the following key conditions which apply to both Options outlined above, even if the club is a sole applicant, as the Council ultimately remains the landowner:

- (i) Charge and Restriction - A charge will be registered at the Land Registry against the club's leasehold title of the pavilion, and a restriction against the Council's freehold title of the pitches. This will mean that the land cannot be sold, subject to a change of use, or mortgaged without the consent of the Football Foundation throughout the 21 year term of the grant agreement.
- (ii) Alienation clause - The Football Foundation requires the alienation clause within the lease to allow the club to be able transfer (or sell) the lease to another club with consent of the Council. The clause must also allow the club to charge the leasehold interest in the property to a funder.
- (iii) Mortgagee protection clause - The Football Foundation require the lease to include a 'mortgagee protection clause' which would enable the Foundation to step in and remedy any breach by the club, and so prevent the Council from otherwise forfeiting the lease.

- (iv) Disposal, Lease, or Change of Use of Facilities - During the Clawback period, the club and Council will also require the Foundation's prior written consent if they wish to transfer, lease, licence or otherwise dispose of all or any part of the facility; grant any charge or cease to use the facility for the purposes previously approved by the Foundation. Failure to obtain consent or to comply with any conditions imposed, shall entitle the Foundation to terminate the grant agreement and to receive repayment from the club and Council of the sum equivalent to the Grant.
- (v) Publicity and record-keeping - The club and the Council will need to work with the Foundation in respect of publicity, monitoring and evaluation for the grant throughout the Clawback Period.

- 3.26 In both scenarios, any lease issued will be held in the name of a company currently being formed by the club. The ground rent will be peppercorn. The club will be responsible for all repairs to the new building. The proposed lease length is currently 25 years and, because the area to be leased is part of a public open space, the Council has already gone through the public notice requirements of s123 of the Local Government Act 1972, advertising its intention to grant a 25 year lease (see paragraph 6.2 below). However the club has requested a term of 50 years (as has been granted to the Chislehurst Invicta Scout Group of part of the Recreation Ground). This would give the club greater long term security, but lessen the Council's flexibility for its future use of the Recreation Ground. In view of this, the fact that the grant from the Football Foundation has a 21 year clawback period, and because a longer lease would require re-advertising the Council's intentions, it is recommended that Members agree a 25 year lease.
- 3.27 The club wants the ability to be able to sub-let the cafe to a third party (subject to a successful variation on their existing Planning Permission). The Football Foundation has no objection to this as long as it is done via a Service Level Agreement or Management Agreement, rather than an underlease. The Council has proposed that the lease for the pavilion is worded such that if the gross turnover of the café exceeds a certain threshold, the club will pay a percentage share of this money by way of rent each year.
- 3.28 During the construction of the pavilion, it is envisaged that the Council will grant a licence to the club's contractor to enable it to occupy an area within the Recreation Ground for storage of building materials, equipment etc. This will be located so as to cause minimum inconvenience to other park users. The licence will require the area to be fully reinstated upon completion of the project.
- 3.29 The pavilion will need to be connected up to local utility services. The details of the routes to be followed by any cabling or pipe-work have yet to be established, but will require the prior consent of the Assistant Director for Streetscene and Greenspace, and Strategic Property.

4. POLICY IMPLICATIONS

- 4.1 The proposals in this report are within existing policy. In the Quality Environment section of the Building a Better Bromley 2020 Vision one of the stated issues is: "Maintaining public satisfaction in the quality of our parks and open spaces, and facilitate new leisure opportunities for the whole community". In addition, the draft Environment Portfolio Plan 2016/19 includes the key aim of 'Working in partnership with volunteers, stakeholders (allotment holders and sports providers) and Friends of Parks groups to ensure local priorities are identified and delivered.' .
- 4.2 The proposals also support Pro-Active Bromley's Strategic Framework 2011-2016 through "Increasing adult participation in sport and physical activity, engaging more children and young people in sport and physical activity, and creating better sport and physical activity pathways

and infrastructure”.

5. FINANCIAL IMPLICATIONS

- 5.1 As set out in 3.6 above, FC Elmstead have been successful in securing funding of £365k to redevelop the pavilion. £258,865 of this funding was secured from the Football Foundation, and has a number of conditions attached to the acceptance of the monies. The report considers two potential options available to the Council for meeting the grant conditions.
- 5.2 In both of the potential options detailed in this report, the club will be holding the Football Foundation grant monies, carrying out procurement and the build themselves. The club are currently assessing tender returns for the capital works.
- 5.3 Although the total project budget cannot be finalised until the tender has been awarded, the final project costs should include the capital works, contingency, professional fees, VAT and the Community Infrastructure Levy payment. There are specific timescales around when the club needs to make its grant claims to the Foundation.
- 5.4 Given that there are a number of risks associated with Option 1 and that the Council may have to incur £14k to ensure that a number of measures are in place to mitigate some, but not all, of the risks, Members are advised to agree Option 2, that the club be solely responsible for the grant monies including procurement and delivery of the project.
- 5.5 In Option 2, the Football Foundation have agreed to accept the proposal from the Council that the 25 year lease for the area of the pavilion be amended to include a right to use the pitches, rather than granting a separate lease. This Option significantly reduces the risks to the Council, in that FC Elmstead would be the sole recipient of the grant and therefore solely responsible for the building over the 25 year term of their full repairing lease.
- 5.6 To mitigate the risks further, officers would still recommend that;
- the club undertake the surveys outlined in 3.12;
 - the club take out a Performance Bond to the value of 10% of the works
 - appropriate conditions relating to the construction period are included in the agreement for lease or lease (as appropriate) to protect the Council's interest during that period
 - the building works are signed off via the Building Control process
 - a 25 year full repairing and insuring lease be issued to ensure the club is responsible for all repairs to the new building during the term
 - The Landscape Group continue to work with the club throughout the project
- 5.7 The lease for the pavilion will include wording around the potential sub-letting of the café to a third party, in that should the gross turnover of the café exceed a certain threshold, the club will pay a percentage share of this money by way of an annual rental sum.
- 5.8 Members should note that the land cannot be sold, subject to a change of use, be transferred through a new lease or mortgaged without the consent of the Football Foundation throughout the 21 year term of the grant agreement. Failure to comply with these conditions shall entitle the Foundation to terminate the grant agreement and to receive repayment from the club and Council of the sum equivalent to the proportion of the grant remaining at that time.

6. LEGAL IMPLICATIONS

- 6.1 Section 123 of the Local Government Act 1972 requires a local authority to secure the best consideration reasonably obtainable when it disposes of land (other than on a lease of 7 years

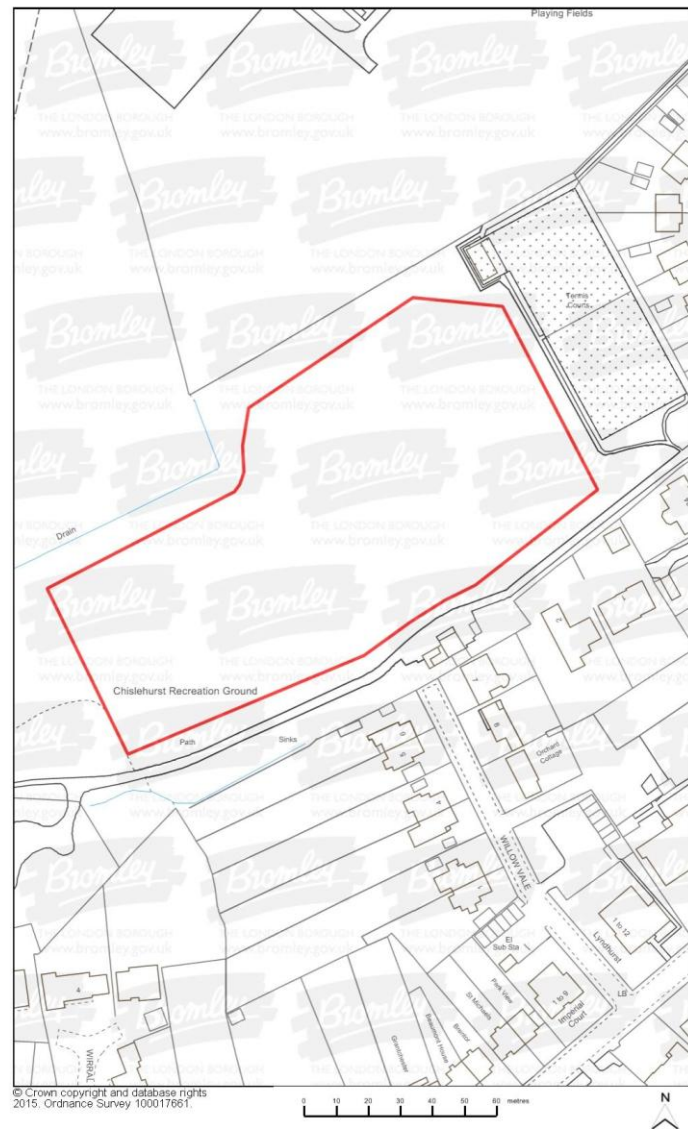
or less) unless it has the benefit of express or general consent of the Secretary of State. However, the General Disposal Consent (England) 2003 does permit a local authority to dispose of land at an undervalue if the amount of undervalue is less than £2m and the authority considers that the purpose for which the land will be used will contribute to the promotion or improvement of economic, social or environmental well-being in the whole or any part of its area, or of all or any persons in the whole or any part of its area. If Members are satisfied that this purpose is met, they could therefore agree to the proposal for the letting of the relevant area of the recreation ground to the Club provided that the amount of any undervalue in capital receipt (or the capital receipt foregone) will be less than £2m.

- 6.2 The proposal to take the area where it is proposed the new pavilion will be built out of the public domain for a period of 25 years (as per the lease) has been advertised in the local press as required by Section 123 of the Local Government Act 1972. One objection was received from an adjoining owner on the grounds that the proposed use would have an adverse effect on their private amenity, but their concerns were dealt with at the planning stage.
- 6.3 A condition of the grant is that a restriction upon the Council's freehold title of the pitches, and a legal charge upon the club's leasehold title of the pavilion, is registered in favour of the Football Foundation at the Land Registry.

Non-Applicable Sections:	Personnel Implications
Background Documents: (Access via Contact Officer)	Appendix 1 - The Football Foundation PL/FA: FF Grants, General Terms and Conditions of Grant October 2009 Appendix 2 - Grant offer letter available upon request



Plan 1



Plan 2