

Decision Maker: **RENEWAL, RECREATION AND HOUSING
POLICY DEVELOPMENT AND SCRUTINY COMMITTEE**

Date: **Tuesday 6th October 2020**

Decision Type: Non-Urgent Executive Key

Title: **CALL-IN: REDEVELOPMENT OF CHISLEHURST LIBRARY**

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Chief Officer: Mark Bowen, Director of Corporate Services

Ward: Chislehurst

1. Reason for report

- 1.1 On 17th September 2020, the Leader published a statement of decision in respect of the Redevelopment of Chislehurst Library (and the disposal of Land at 36 Vinson Close, Orpington). The report (a part 2 document) had previously been scrutinised by this Committee at the meeting on 2nd September 2020, and was available for scrutiny by Executive, Resources and Contracts PDS Committee on 10th September 2020. After pre-decision scrutiny and consultation with other members of the Executive, the Leader decided to approve the proposals as recommended in the report.
- 1.2 The decision on Chislehurst Library has been called in by Councillors Angela Wilkins, Ian Dunn, Vanessa Allen, Kathy Bance, Kevin Brooks and Josh King, and other members of the Labour Group. This Committee is requested to consider what action should be taken in response to the call-in of this decision; the options are to refer the decision back for re-consideration, or to take no further action on the call-in, in which case the decision may be implemented without any further delay.

2. **RECOMMENDATIONS**

The Committee is recommended to agree one of the following options in response to the call-in:

- (i) to take no further action on the call-in;**
- (ii) to refer the decision to the Executive giving reasons why it should be reconsidered.**

Impact on Vulnerable Adults and Children

1. Summary of Impact: It is considered that there will be an impact on Vulnerable Adults and Children as users of the service.
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Corporate Policy

1. Policy Status:: Existing Policy
 2. BBB Priority: Vibrant, Thriving Town Centres, Regeneration, Excellent Council
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Financial

1. Cost of proposal: Estimated Cost: See section 6 in the attached report
 2. Ongoing costs: Not Applicable
 4. Total current budget for this head: Not Applicable
 5. Source of funding: Not Applicable
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Personnel

1. Number of staff (current and additional): Not applicable
 2. If from existing staff resources, number of staff hours: Not applicable
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Legal

1. Legal Requirement: Not applicable
 2. Call-in: Applicable: The decision has been called in.
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Procurement

1. Summary of Procurement Implications: See attached report
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Customer Impact

1. Estimated number of users/beneficiaries (current and projected): Well managed buildings will improve customer experience.
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Ward Councillor Views

1. Have Ward Councillors been asked for comments? Yes
2. Summary of Ward Councillors comments: Ward members support the proposals

3. COMMENTARY

- 3.1 On 17th September 2020, the Leader of the Council published a statement of decision in respect of the Redevelopment of Chislehurst Library (and the disposal of Land at 36 Vinson Close, Orpington). The decision on Chislehurst Library was to dispose of the site to Prime Redevelopments Ltd to create a new Medical Health Centre and replacement Library on the site. The report (attached as a part 2 appendix) had previously been scrutinised by this Committee at the meeting on 2nd September 2020, and was available for scrutiny by Executive, Resources and Contracts PDS Committee on 10th September 2020. This Committee supported the proposals in the report, but requested that a part 1 version be made available, without sensitive commercial information – this is attached as appendix 4. After pre-decision scrutiny and consultation with other members of the Executive, the Leader decided to approve the proposals as recommended in the report, both for Chislehurst Library and 36 Vinson Close.
- 3.2 The decision on Chislehurst Library has been called in by Councillors Angela Wilkins, Ian Dunn, Vanessa Allen, Kathy Bance, Kevin Brooks and Josh King, and other members of the Labour Group. The reason for the call-in is set out in appendix 1 (with exempt information removed) and in full in appendix 5. This Committee is requested to consider what action should be taken in response to the call-in of this decision.
- 3.3 The two options before a PDS Committee when considering a call-in are –
- (i) to take no further action on the call-in (in which case the decision may be implemented); or
 - (ii) to refer the decision to the Executive giving reasons why it should be re-considered.

In exceptional circumstances, a decision may be referred to full Council for full Council to consider whether to refer it to the Executive, but only where the Committee believes, on appropriate officer advice, that there is an intention by the Executive to take action that is contrary to law or the policy and budget framework of the Council. This does not apply in this case.

- 3.4 Members are requested to note that some of the information relating to this matter is exempt from publication under paragraph 3 of Schedule 12A of the Local Government Act 1972 - this should not be discussed in public.

Comments from the Director of Housing, Planning, Property and Regeneration

3.5 Summary of reasons for call in:

Inadequate evidence that the disposal of this land to the chosen bidder (for 30% less than the highest bid) complies with the legal requirement on the Council to deliver the best possible return for sale of its assets.

- 3.6 Under section 123 of the Local Government Act 1972, a local authority has the power to dispose of land. The main caveat to this power is that the council must not do so for “a consideration less than the best that can be reasonably obtained”. This is often interpreted as being the best price achievable in the open market.
- 3.7 Key principles on a lawful approach and factors a court will take into account are usefully set out in the case of *Faraday Development Limited v West Berkshire* [2016] EWHC 2166:
- a. The Court is not entitled to substitute its own view on the facts and merits for that of the local authority. The Court may only interfere if there was no material upon which the authority's decision could have been reached, or if in reaching that decision, the authority

disregarded matters it ought to have taken into consideration, or if it took into account matters which were irrelevant, or if its decision was irrational.

- b. In the case of the best consideration duty the Court is only likely to find a breach where an authority has failed to take proper advice, or (b) failed to follow proper advice for reasons which cannot be justified, or (c) although following advice, it followed advice which was so plainly erroneous that in accepting it the authority must have known, or at least ought to have known, that it was acting unreasonably.
 - c. That duty does not mandate the authority to have regard to any particular factors nor is there any need for the authority's decision-making process to refer to it explicitly, provided that the Court is able to see that the duty has in substance been performed. The duty is not to conduct a particular process, but to achieve a particular outcome. However, process may have an important or even determinative, evidential role in deciding whether the authority has complied with that duty.
 - d. "Consideration" is confined to those elements of a transaction which are of commercial or monetary value. Therefore the Court will quash a decision to sell property where the authority has taken into account an irrelevant factor, e.g. job creation, when assessing whether it is obtaining the best "consideration" reasonably obtainable.
 - e. The deliverability or credibility of a bid, or the care with which it has been prepared, are commercial factors which are relevant to an assessment of whether the "consideration" offered is the best reasonably obtainable. Likewise, the highest offer on the table need not represent the best "consideration", because an authority may conclude that "a bird in the hand is worth two in the bush".
 - f. There is no absolute requirement to market the land being disposed of, or to obtain an independent valuation.
- 3.8 Therefore the focus of the duty is on the outcome rather than any particular process being followed. That said, if a disposal were to be challenged, the Courts as set out in Faraday are likely to find the duty to obtain best consideration has not been complied with where:
- there is a failure to take proper advice;
 - proper advice has been obtained but there has been a failure to follow it for reasons that cannot be justified; or
 - advice has been obtained and followed, but the advice is so plainly wrong that the Council either knew or ought to have known it was acting unreasonably
- 3.9 Whilst the Prime Offer was not the highest bid received, careful consideration and legal advice was sought in light of Section 123 best consideration obligations for the disposal of the site. It was decided that the Prime bid should formally be accepted, since although it was not the highest offer in financial terms, it was not conditional upon extraneous factors such as the exercise of an option to acquire additional land or on obtaining finance for the development at some unspecified time in the future following further marketing of the site to a developer as proposed in the bid from the highest bidder and was therefore perceived to be the best offer reasonable obtainable.
- 3.10 It should also be noted that as the Prime offer was based around the provision of a new medical centre, then the application of General Consent (the General Disposal Consent (England) 2003) can be factored in, which gives consent to the disposal of any interest in land at less than best consideration where the Council considers it will help it to secure the promotion or improvement of the economic social or environmental well-being of its area, subject to the condition that the undervalue (i.e. the difference between the consideration

obtained and the best consideration that can reasonably be obtained) does not exceed £2million.

- 3.11 The Chislehurst Library disposal would fall within this consent as it is considered that the provision of a new Medical Centre will promote or improve the economic and social well-being of the Chislehurst area and the disposal receipt is well within the threshold. Therefore given uncertainties evident in the highest bid, the second best bid was selected and recommended to Members on the basis of the general consent, decision to select the Prime bid was reached.

3.12 Transparency/scrutiny

Options for Chislehurst Library were first discussed in September 2014, culminating in a decision in November 2016 to grant the lease to Milngate for redevelopment of the site, to include retail and housing provision. Officers were instructed and delegated to agree the lease thereafter.

This issue did not appear again before any committee until 2 September 2020; the imminence of this decision had not been reflected in the council's Forward Plan, as is required by the Council's own procedures. No committee papers were available to the public until after RR&H PDS had met and made its recommendations on 2nd September.

- 3.13 The Part 2 Report on Chislehurst Library was scrutinised at the RR&H PDS on 2 September 2020. Members requested that elements of the Report relating to the process of evaluation should be contained within a Part 1 format. The minutes of that meeting together with the Part 1 Report were then published – please see attached Appendixes’.
- 3.14 The Executive agreed at its meeting on 10th September 2014 that Chislehurst Library, together with the adjoining pay and display car park, should be marketed, on the basis that a replacement library would have to be provided as part of the consideration for the site. Members were advised at that time that the current library is poorly laid out, leading to access issues. It is also significantly dated in its appearance. A development opportunity potentially allows for the provision of a new library, but constructed with modern materials, which will reduce the Council's long-term maintenance and revenue running costs. Experience elsewhere has shown that where libraries are renovated and improved use significantly increases and remains higher than prior to any improvement works. Chislehurst Library plays an important part in the overall library delivery strategy and it is envisaged that this will continue over the long term.
- 3.15 The library element of every proposal put forward was a key criteria when assessing the offers received. The selected purchaser will be providing a library of no less than 695 sq m as advertised. The site was also marketed on the basis that any prospective bidder would be responsible for the provision of a temporary library facility at their cost (save running costs). The key point is that the proposal required a replacement library within any proposed development scheme and a capital receipt for the land disposal.
- 3.16 **Furthermore, numerous issues arise from the Part Two report presented to RR&H PDS on 2 September, namely:**
- 1. No explanation is provided as to why the instructions to officers made in November 2016 has not been implemented**
- 3.17 The Part 2 report presented to RR&H PDS on 2 September detailed the outcome of a marketing exercise undertaken by the Council, following the collapse of negotiations between

the previously identified preferred bidder where it was not possible for the Council to enter into a Development Agreement. That bidder was also the highest bidder in the marketing exercise the subject of the Part 2 report scrutinised on 2 September 2020. It should be noted that their offer was not compliant from the start of the process as they wished to pursue a scheme that included land outside of the Council's ownership, however in order to ensure that the Council receives best consideration it was not dismissed and pursued to see if it could be delivered.

- 3.18 A core objective of the Council is certainty of delivery. The process was run in a way that provided parties ample opportunity (first round/second round/clarification stage) to detail their proposal, answer clarification questions, and provide any additional information that they deemed helpful to support their proposal and demonstrate that this core objective would be met. The bidder in this case failed to adequately provide the information needed to give assurance that their scheme was deliverable in terms of planning risk, detailed financial funding, timing and clarity of who the occupier of the scheme would be.
- 3.19 Specifically, the highest bidder did not offer proof of funds for the scheme other than providing an undated letter of support from their bank. Whereas Prime provided detailed accounts demonstrating they held sufficient funds for the purchase, planning and development stages as requested as did the third highest bidder who was also considered. All bidders were asked to undertake a pre-app as to the viability of their scheme, which the shortlisted bidders did, so that their final offers could reflect any Planning issues. The highest bidder chose not to do so and relied upon their previous pre-app. Their previous pre-app raised considerable concerns about their proposed scheme.
- 3.20 The highest bidder was looking to secure the contract on the site to enable them to act as Development Manager for a scheme which extends beyond the Council's site and is conditional on the exercise of an option on the adjoining land by a fixed date. They could not demonstrate funding, a delivery partner or an exit strategy at this stage meaning that the headline land price of their offer was founded on several high- risk assumptions and certainty of delivery could not be guaranteed to the Council.

2. There is no record of the PfH or members authorising Cushman & Wakefield to go to the market again in 2019/20; on whose authority did they do so?

- 3.21 The decision to instruct Cushman & Wakefield was taken following consultation and agreement with both Ward Members and the Portfolio Holders for Resources and Regeneration following the collapse of negotiations between the previously identified preferred bidder where it was not possible for the Council to enter into a Development Agreement. A formal member decision was not required. Cushman & Wakefield were instructed as the TFM Contract with the Council allowed for such instruction.

3. There is no adequate explanation why Cushman & Wakefield recommended a shortlist of 8 bidders should be reduced "to 5 or less" and why only 3 bidders are named in the report

- 3.22 C&W received a total of 17 expressions of interest, with the primary use classes being pursued by interested parties to be delivered in conjunction with the Council's library primarily being either residential accommodation, or retail (food store), whilst a single submission was received for a medical use. Of these interested parties 8 were deemed to meet the base requirements for further dialogue/consideration.
- 3.23 The initial shortlist stood at 8 and C&W encouraged the reduction of this shortlist to 5 parties. C&W advised that formulating fully worked offers for the opportunity requires parties to invest time, resources and money into advancing their schemes. To ensure the shortlisted parties

undertake the level of work required to allows them to conclude on a preferred party, they advised the need to reduce the number of participants sufficiently that shortlisted parties feel there is a high enough chance of them being selected to speculatively pursue the opportunity.

- 3.24 A shortlist of 5 or less parties was deemed suitable to achieve this, whilst also enabling the Council to engage with each party to ensure that their key objectives and requirements are being accommodated for as scheme designs advance. However, following further discussions with the Council, the decision to proceed with 8 parties was made.
- 3.25 Following the selection of the shortlist, eight parties were informed that they were invited to participate in the second stage process and informed of their requirements to conduct a pre-application. During the course of the pre-application process required of shortlisted parties, 3 of the 8 shortlisted parties withdrew for various reasons personal to each party and 5 second round bids were received in total. Of these 5 offers, two were discounted as they were not financially viable options for the Council leaving 3 shortlisted parties for further consideration. The other bidders ranged from residential schemes which upon closer scrutiny were deemed unviable.
- 3.26 The report focused on the outcome of the marketing exercise and the above process. The three highest bids were ultimately the ones which were taken forward for more detailed consideration in any event.

4. The report makes reference to “further questions need to be asked of ... future provision of medical facilities and whether this may [well] be seen as an essential function” (para 3.24). No responses to this question have been provided

- 3.27 As previously stated the Prime offer was based around the provision of a new medical centre, then the application of General Consent (the General Disposal Consent (England) 2003) can be factored in, which gives consent to the disposal of any interest in land at less than best consideration where the Council considers it will help it to secure the promotion or improvement of the economic social or environmental well-being of its area, subject to the condition that the undervalue (i.e. the difference between the consideration obtained and the best consideration that can reasonably be obtained) does not exceed £2million.
- 3.28 The Chislehurst Library disposal would fall within this consent as it is considered that the provision of a new Medical Centre will promote or improve the economic and social well-being of the Chislehurst area and the disposal receipt is well within the threshold. The Part 2 report paragraph 3.24 should have linked this point – in that a new medical centre would be seen as a use which could be legitimately considered under the General Consent (the General Disposal Consent (England) 2003).

5. Para 3.25 makes reference to [the proposal for medical facilities requiring] “CCG support”. No such evidence is provided in the report.

- 3.29 The bid received by Prime contained a letter from the CCG supporting the Prime bid. Officers also checked directly with the CCG who confirmed that they were supportive of this bid and that it was included within their strategic direction for delivery of services for Bromley/Chislehurst.

Appendices

3.30 The following appendices are attached to this report in part 1 -

Appendix 1: Part 1 Reasons for Call-in

Appendix 2: Statement of Decision by the Leader of the Council on 17th September 2020

Appendix 3: Part 1 Minutes of RR&H PDS Committee on 2 September 2020

Appendix 4: Part 1 Report to RR&H PDS Committee on 2 September 2020

3.31 The following appendices are not for publication, but are attached in part 2 -

Appendix 5: Part 2 Reasons for Call-in

Appendix 6: Part 2 Minutes of RR&H PDS Committee on 2 September 2020

Appendix 7: Part 2 Report to RR&H PDS Committee on 2 September 2020

Non-Applicable Sections:	Impact on vulnerable adults and children/Policy/Financial/Personnel/Legal/Procurement
Background Documents: (Access via Contact Officer)	None