

**LAND PROMOTION AGREEMENTS**

**To:** Commercial and Investment Committee

**Meeting Date:** 23<sup>rd</sup> November 2018

**From:** Deputy Chief Executive & Chief Financial Officer

**Electoral division(s):** All

**Forward Plan ref:** Not applicable      **Key decision:** No

**Purpose:** This report provides the Committee with an overview of the background to the use of Promotion Agreements and provides details of two specific proposals for the Committee to consider.

**Recommendation:** It is recommended that the Committee;

- a) notes the content of this report;
- b) determines whether it wishes to enter in to either of the two promotion agreement proposals as set out in Appendix A or B;
- c) subject to the outcome of recommendation b) authorises the Deputy Chief Executive to enter in to detailed discussions with the 'promoting organisations' and agree commercial terms in consultation with the Chairman of the Committee.

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## **1. BACKGROUND**

- 1.1 Typically a land promotion agreement provides that the promoter (usually a developer or specialist planning consultancy) will, at its own cost, apply for and use reasonable endeavours to obtain planning permission. Once planning permission has been obtained, the land will be marketed for sale and the landowner will be obliged to sell. The promoter will then receive a fee out of the sale proceeds – usually a percentage of the net proceeds plus reimbursement of the promotion costs which it has incurred.
- 1.2 Promotion agreements are often preferred by landowners as they do not usually require the landowner to sell the land to the developer. Instead, after planning permission has been obtained, the promotion land must be marketed for sale and sold in the open market for the best price reasonably obtainable. The net sale proceeds are divided between the landowner and the 'promoter'. This does mean that the purchase price for the land will have been market tested - which does not happen in the case of an option agreement. The 'promoter' is less likely to agree to unreasonable planning gain costs with a local planning authority, since this will impact on its share of the proceeds of sale.

## **2. PROMOTION AGREEMENT CONTENTS**

- 2.1 There are a number of important provisions which a promotion agreement should contain, including those set out below.
- 2.2 A list of promotion objectives - which the developer should be obliged to use reasonable endeavours to achieve.
- 2.3 Various planning obligations on the developer - a well advised landowner will require a degree of control in relation to planning matters and the right balance will need to be struck in order to ensure that both parties' interests are safeguarded and neither party feels exposed.
- 2.4 Various obligations on the landowner - such as to enter into any required planning agreement, to sign promptly any contract and execute any transfer in order to achieve a sale of the promotion land and not to transfer, lease, charge or deal with the property in any way.
- 2.5 Provisions dealing with the marketing and sale of the promotion land - a landowner may wish to consider including minimum purchase price provisions.
- 2.6 Provisions dealing with costs, including planning costs, land costs and infrastructure costs - a well advised landowner will want to ensure that all costs incurred by a developer are reasonable and may wish to have the ability to approve such costs or to impose a cap on such costs. The parties will need to be aware that the carrying out of infrastructure works may trigger a liability to pay the community infrastructure levy.
- 2.7 Provisions dealing with how the sale proceeds are to be distributed between the landowner and the developer - the parties will need to be aware that VAT will be payable on the developer's share of the net proceeds of sale and the landowner will not be able to recover any VAT unless he has 'opted to tax'.

- 2.8 Provisions dealing with the duration of the promotion agreement - the promoter will not want the promotion agreement to terminate if, at the expiration of the promotion period, a satisfactory planning permission has been granted and the promotion land or part of it remains to be sold.
- 2.9 Provisions dealing with security and the protection of the developer's interest in the promotion agreement.

### **3. ADVANTAGES OF PROMOTION AGREEMENTS**

- 3.1 A land promotion agreement can have certain advantages for both parties over a more traditional option for the developer to buy the land, which are as follows:-
- From the developer's point of view, they do not have to buy the land in order to achieve a profit.
  - There is more flexibility about the timing of a sale once permission is obtained – the parties may, for example, agree to delay a sale if market conditions are likely to improve.
  - If the land is marketed properly, then the landowner can be sure that they will obtain the best price reasonably achievable for the land.
  - The promoter and landowner should both have a common interest of achieving the best price. This is in contrast to an option agreement where the landowner will argue for the highest possible price while the developer will seek the lowest price, which can lead to a great deal of time being spent arguing about "market values".

### **4. RISKS ASSOCIATED WITH LAND PROMOTION AGREEMENTS**

- 4.1 Length of the agreement:  
This is important as during the agreement the landowner is not permitted to pursue other disposal opportunities. Note that there is usually provision for the original period of the agreement to be extended if there is a pending planning decision/appeal at the end of that time, which allows for a further period to achieve a sale. It may therefore be quite some time before the landowner receives any money.
- 4.2 Planning process:  
A landowner will usually want to have some input into the planning application. If the application is not for the whole site it makes the application and any subsequent sale much more complicated. The agreement should also provide that the promoter should appeal against a planning refusal if there is more than, say, a 60% chance of such appeal succeeding.
- 4.3 Sale process:  
It is very important that the landowner is happy with how this is to be handled as any lack of clarity can result in litigation. The promotion agreement should therefore make it clear:-
- Whether a sales agent is to be appointed and, if so, who that will be or whether there will be a tender process.
  - Whether a minimum price can be included as a "safety net" for the landowner.
  - Whether the landowner is obliged to accept a sale in tranches or with some deferred consideration.

- If the landowner has retained land, whether rights for access or services to the retained land be included in the sale transfer.
- If applicable, whether the landowner can retain a ransom strip between any adjoining third party land that may be developed in the future.

#### 4.4 Promotion costs:

These can be extensive given that these will be speculative developments. In order to ensure that costs do not become excessive relative to the value of the opportunity a landowner will usually want to include a cap on costs. Alternatively, the parties may agree that the promoter is not reimbursed their promotion costs but receives a greater percentage of the sale proceeds.

#### 4.5 Vacant possession/third party rights:

This could be a risk given that any agreement is likely to involve tenanted farms. The agreement will need to provide that the landowner must be able to sell the land with vacant possession once permission has been obtained. Any tenancies must therefore be properly documented as farm business tenancies or similar arrangements which include provisions for the landowner to regain possession within a reasonable notice period.

#### 4.6 Fees:

The promoter will not usually pay the landowner a fee for entering into the agreement but will usually be responsible for the landowner's legal and agent fees in connection with the agreement. It is important therefore that the landowner takes proper professional advice before signing the agreement – it will be too late to argue about these points once planning permission has been obtained.

#### 4.7 Competition:

The landowner may wish to include a provision that the promoter will not seek to promote other sites in the immediate vicinity, otherwise an unscrupulous developer could use a promotion agreement to prevent a landowner from putting forward a scheme which may prejudice one of its existing potential developments.

### 5. APPROACHES RECEIVED

- 5.1 The Council have received two approaches to enter in to promotion agreements and the contents of these proposals are set out in **Appendices A and B** that are attached to this report.

### 6. ALIGNMENT WITH CORPORATE PRIORITIES

#### 6.1 Developing the local economy for the benefit of all

There are no significant implications for this priority

#### 6.2 Helping people live healthy and independent lives

There are no significant implications for this priority

#### 6.3 Supporting and protecting vulnerable people

There are no significant implications for this priority

## 7. SIGNIFICANT IMPLICATIONS

### 7.1 Resource Implications

No significant implications

### 7.2 Procurement/Contractual/Council Contract Procedure Rules Implications

No significant implications

### 7.3 Statutory, Legal and Risk Implications

Risks are as detailed in section 4.

### 7.4 Equality and Diversity Implications

No significant implications

### 7.5 Engagement and Communications Implications

No significant implications

### 7.6 Localism and Local Member Involvement

Local Members have been informed of the proposals.

### 7.7 Public Health Implications

No significant implications

Implications	Officer Clearance
Have the resource implications been cleared by Finance?	Yes Name of Officer: Tom Kelly
Have the procurement/contractual/ Council Contract Procedure Rules implications been cleared by the LGSS Head of Procurement?	Yes Name of Officer: Paul White
Has the impact on statutory, legal and risk implications been cleared by LGSS Law?	Yes Name of Officer: Mickaela McMurtry
Have the equality and diversity implications been cleared by your Service Contact?	Yes Name of Officer: Chris Malyon
Have any engagement and communication implications been cleared by Communications?	No
Have any localism and Local Member involvement issues been cleared by your Service Contact?	Yes Name of Officer: Chris Malyon
Have any Public Health implications been cleared by Public Health	No

## 8. SOURCE DOCUMENTS

Source Documents	Location
None	

