

## REPORT TO CABINET

26 June 2019

<b>Subject:</b>	<b>Lease of Land off Sandy Lane, Wednesbury</b>
<b>Presenting Cabinet Member:</b>	<b>Cllr Bob Lloyd – Member for Inclusive Economic Growth</b>
<b>Director:</b>	<b>Director of Regeneration and Growth - Amy Harhoff</b>
<b>Contribution towards Vision 2030:</b> 	
<b>Key Decision:</b>	Not included in the 28 Day Notice
<b>Cabinet Member Approval and Date:</b>	Cllr Lloyd 5/6/19
<b>Director Approval:</b>	Amy Harhoff Director of Regeneration & Growth
<b>Reason for Urgency:</b>	This decision relates to a contractual clause in the lease agreement requiring a specified notice period to be given, a June 2019 decision is required in order to provide the requisite notice and enable the clause to be exercised on the earliest applicable date.
<b>Exempt Information Ref:</b>	Exemption provisions do not apply
<b>Ward Councillor (s) Consulted (if applicable):</b>	Ward councillors have not been consulted
<b>Scrutiny Consultation Considered?</b>	Scrutiny consultation has not been consulted
<b>Contact Officer(s):</b>	David Harris Service Manager - Strategic Assets and Land david_harris@sandwell.gov.uk

## **DECISION RECOMMENDATIONS**

### **That Cabinet:**

- Agrees to the Director - Regeneration and Growth exercising the break clause within the existing Lease between Sandwell Council and Network Rail Limited in respect of the land at Sandy Lane Friar Park, Wednesbury detailed within the Lease.
- Agrees to the Director - Regeneration and Growth entering into discussions/negotiations with Network Rail regarding Council owned land at Sandy Lane, Friar Park, Wednesbury (including the land as detailed within the abovementioned Lease) concerning proposed access for the proposed/planned Network Rail 'Concrete Sleeper Factory'.

## **1 PURPOSE OF THE REPORT**

- 1.1 To inform Cabinet of the current contractual position with Network Rail Limited (hereinafter NRL) concerning a Lease of Council land off Sandy Lane Wednesbury. The Lease is included at Annex A to this report and was agreed on 2 September 2016 ("the Lease"). The Lease was agreed in response to a proposed NRL scheme for a Concrete Sleeper Factory that sought access off Sandy Lane using the land owned by the Council ("the Proposed Development").
- 1.2 The Lease allowed NRL to progress its preferred Proposed Development at that time.
- 1.3 Since the Lease was entered into, the design of the Proposed Development has evolved and NRL is now also seeking additional land in Council ownership, which Network Rail believe will deliver a more desirable access route into the Proposed Development site should it go forward.
- 1.4 The Lease was entered into by NRL specifically to facilitate alternative access for the Proposed Development in preparation of a planning application. The Lease also set out the terms for a potential transfer of the Council land originally included within the Lease.

- 1.5 The land falling within the Lease may no longer be sufficient to accommodate the revised access now sought by Network Rail for the Proposed Development. In order to facilitate the revised access as part of the Proposed Development, Network Rail are seeking additional Council owned land that does not fall within the Lease.
- 1.6 The purpose of this report is for the Cabinet to agree triggering the break clause contained within the existing Lease to end the current contractual relationship as this agreement can no longer be considered fit for purpose.
- 1.7 Cabinet is asked to agree that senior officers are able to continue a commercial negotiation in respect of the full extent of the land for the preferred access to the Proposed Development, to ensure that any access meets the Council's requirements. The reasons for this continued dialogue are set out in the main body of this report. The terms of any future transfer of Council land to NRL in connection with their access requirements to be agreed in accordance the Council's Financial Regulations.

## **2 IMPLICATION FOR THE VISION 2030**

- 2.1 The proposals in this report contribute to achieving the council's ambitions as follows:
  - Ambition 10. Sandwell now has a national reputation for getting things done, where all local partners are focused on what really matters in people's lives and communities
  - Ambition 9. Sandwell has become a location of choice for industries of the future where the local economy and high performing companies continue to grow.

## **3 BACKGROUND AND MAIN CONSIDERATIONS**

- 3.1 In April 2015, NRL approached the Council regarding the availability of some 0.2 hectares of land owned by the Council at Sandy Lane, Friar Park, Wednesbury, to help facilitate their proposals for a proposed concrete sleeper factory development. Specifically the land would accommodate an improved access arrangement to the existing development. which would then also be used by the proposed additional development of the Concrete Sleeper Factory .

- 3.2 The NRL Proposed Development is to build a Concrete Sleeper Factory which is currently proposed on an 8-hectare site in the north of Sandwell off Sandy Lane, close to the border with Walsall and adjacent an existing large rail freight facility. When the Lease was granted the proposed site was 7.5 hectares, and a further 0.5 hectares have been identified since the Lease was completed). Previous correspondence from NRL had suggested it is forecast to deliver 600,000 sleepers per annum to support the expansion and maintenance of national railway assets; based on this correspondence it is reasonable to accept that there is genuine demand for this facility, further details would come forward as part of any planning application for the development.
- 3.3 The site identified by NRL for the Proposed Development, is currently in dual ownership, with SMBC owning 0.7 hectares (0.2 hectares included within the Lease, and a further 0.5 hectares identified as additional land since the Lease was granted) and NRL owning the remaining 7.3 hectares. The site is also directly adjacent the 26-hectare Friar Park site, which has a Black Country Core Strategy strategic housing allocation and a primary allocation in the Site Allocations and Delivery Development Plan for predominantly residential use with a development capacity of over 750 houses. The Council is currently working with the West Midlands Combined Authority to accelerate housing delivery and have secured regional funding to support the development of the housing site.
- 3.4 During 2015 the initial discussions between NRL and the Council around land acquisition were primarily concerned with seeking assurances around the deliverability of the concrete sleeper factory and that such a development would not compromise the delivery of the land already identified and allocated for residential use. NRL subsequently re-framed their offer and requested a simple option agreement in respect of 0.2 hectares of Council land provisionally identified so as to give both parties comfort that a transfer of the land would only occur in the event that planning permission was obtained for the Proposed Development, and that the Proposed Development was deliverable.
- 3.5 In July 2016, and after detailed negotiation between NRL and the Council, the parties provisionally agreed the terms of an option for NRL to acquire, at a market value, the 0.2 hectares of land identified. This option was linked to a proposed 99 year Lease agreement (for the same land) initially at a peppercorn rent. This land was required in respect of providing a wider access to the Proposed Development site. The agreement also referenced a 5 year rent review (to bring the rent in line with market value) and a break option in favour of SMBC in the event that a planning consent was not obtained, and the facility did not become operational within three years of the date of the Lease. The Proposed Development was discussed as part of Cabinet workshops at this time.

- 3.6 On the 2 September 2016, Sandwell Council entered into a 99 year lease with NRL and included an option for NRL to purchase the 0.2 hectares of land (hereinafter “the leased land”). The sale of the leased land was conditional on a planning permission being secured and subject to Cabinet Approval.
- 3.7 The grant of the lease enabled NRL to formally develop proposals to widen the existing access serving the current NRL operational facilities at Sandy Lane. If the Proposed Development (The Concrete Sleeper Factory) is approved, the leased land would provide a more substantive access to the proposed site. At this stage however, it is not clear whether the widened access (requiring the leased land) is material to the acceptability of the planning application; this will be determined through the planning application process.
- 3.8 The Lease contains a break clause exercisable by both parties, a market value rent review clause and an option for NRL to acquire the 0.2 hectares (the leased land) at market value (or an option to acquire it for £120,000 index linked if the option is triggered within 12 months of NRL obtaining planning permission). The lease was signed on 2 September 2016 under delegated powers afforded to the then Director of Regeneration and Economy.
- 3.9 It is anticipated that the leased land may be subject to contamination. The Lease deals with the contamination issue and sets out the landlord’s and tenant’s responsibilities in respect of remediation. The Lease states that the Council is to retain responsibility for any historic contamination but specifies that in the event the leased land is to be sold, a restrictive covenant would be applied, allowing the land to be used for vehicular and pedestrian access only. The Council’s risk is therefore managed as intrusive groundworks to facilitate significant building work on the site will not be necessary, mitigating any potential cost to the Council in the future.
- 3.10 In September 2018 NRL approached the Council with regards to acquiring additional land in the ownership of the Council to help facilitate some amendments to NRL’s concrete sleeper factory development proposal. It is understood the revised proposals are intended to enable a less obtrusive development, NRL is now seeking to move the location of the proposed concrete sleeper factory development site southward, away from existing residential properties and the proposed Friar Park Housing Site.
- 3.11 NRL has requested that the Council enter into a similar arrangement as the 2016 Lease to enable NRL to potentially acquire an additional 0.5 hectares, again for access and amenity use to service it’s Proposed Development.

- 3.12 This request has been acknowledged and proposed heads of terms received from NRL, but to date no further negotiations have taken place between NRL and the Council in connection with this additional 0.5 hectares of land now sought by NRL. The officer recommendation is that should the Council be willing to consider any further contractual relationship with NRL in respect of the improved access to the proposed Concrete Sleeper Factory Development, that this would be best served via a new agreement to be negotiated.
- 3.13 The planning application for the Proposed Development has not yet been received. Any proposal would be subject to a full transport assessment, which would provide the evidence to assess the acceptability of any proposed access. The materiality of the land in discussion, in regard to whether it is required to facilitate a reasonable vehicular access into the Proposed Development site has not therefore been concluded. It is reasonable to judge that this land provides for an access option that would take any vehicle movements further away from residential properties than the existing access on Sandy Lane.
- 3.14 On the information available, it appears that NRL has a genuine desire to progress the Proposed Development and would be willing to negotiate further in respect of the access land identified. If the Council and NRL are unable to reach an agreement, NRL may pursue alternative options to secure access to the Sandy Lane site (if this continues to be the preferred location for the Proposed Development).
- 3.15 The proposals outlined around the negotiation on commercial terms of any new agreement, post the execution of the break option, will be in accordance with the Council's existing practices and policies for the disposal of land and premises and also in accordance with the provisions of Section 123 of the Local Government Act, 1972 i.e. at best consideration.
- 3.16 In the event of any further negotiated disposal, the Council can ensure that terms are agreed which protect the Council's long term interests. The

#### **4 CURRENT POSITION**

- 4.1 The current contractual position is that NRL and the Council are bound by the terms of the 99 year Lease (as mentioned above). A copy of the Lease and Location Plans are included as appendices 1,2 and 3. The Lease is a lengthy legal document, which contains a number of detailed provisions, and as with any contractual document, it can be subject to a degree of legal interpretation, however the basic terms are set out below, and each of the basic terms are discussed in more detail in the following paragraphs:

- **Parties:** The Borough Council of Sandwell (Landlord) and Network Rail Infrastructure Ltd (Tenant)
- **Premium:** A premium of £1 was payable upon completion
- **Rent:** £1 per annum for the first 5 years, then subject to a rent review every 5 years, to market rent
- **Term:** 99 years from 2 September 2016
- **Break Clause:** The Tenant may terminate the Lease at any time, on three months' notice,
- The Council may terminate the Lease at any time after the third anniversary, on three months' notice
- **Option:** The Lease contains an option for the Tenant to purchase the freehold of the site (see below)

- 4.2 **Parties:** the Lease does not permit NRL to assign or sublet the property to another party, except that it may be assigned to a Group Company (as defined in the Landlord & Tenant Act 1954). If the Council were to sell its land, it would be sold subject to the Lease (and the Option to purchase)
- 4.3 **Premium:** It is common, practice to include a premium when granting a long lease, especially where there is a peppercorn or nominal rent payable, however the premium does not necessarily always reflect the value of the freehold. A nominal premium, as in this case of £1, is acceptable, and satisfies the legal requirement for there to be consideration paid pursuant to a contract.
- 4.4 **Rent:** The Lease includes a nominal rent of £1 per annum, for the first 5 years, and includes a provision that the rent is to be reviewed every 5 years. The Council's usual position with regard to rent reviews, in longer term leases, is for there to be an upwards only, rent review every 5 years, the Lease to Network Rail includes a rent review clause on these terms. A nominal rent at the beginning of a longer term lease, again is fairly common, particularly where the tenant is required to invest money into a property, to make it suitable for the intended use, and the length of the rent concession is usually up for negotiation, depending on the value of the investment required.
- 4.5 **Term:** a term of 99 years, is usually considered to be a virtual freehold, however the inclusion of the Landlord's break clause, means that there isn't the certainty ascribed to longer term lease for the tenant, and so this Lease is unlikely to be considered to give the same security. The Lease is also excluded from the Security of Tenure provisions of the Landlord & Tenant Act 1954, so the Council is able to avoid the protection afforded by that Act.
- 4.6 **Break Clause:** Either party may terminate the Lease on not less than three months' notice (this means that more notice can be given, but the minimum is three months), except the Tenant may terminate at any time, and the Council may terminate at any time after the third anniversary. The Council's Break Clause will only be effective, if on the date of the service of the notice, the site is not being used operationally as a concrete

sleeper factory (so if the site is up and running, the Council cannot serve an effective notice, but provided the site is not operational, the Council can serve notice).

- 4.7 **Option:** The Lease contains an option for Network Rail to acquire the freehold on service of a notice, during the first 6 years of the term. The option is subject to the requirement for the Council to obtain any necessary approvals or consents. The Purchase Price is set at £120,000 unless the option notice is served more than 12 months after the planning consent is obtained, if the option notice is served more than 12 months after planning consent, then the Purchase Price is the higher of £120,000 or the market value of the site.

## 5 **CONSULTATION (CUSTOMERS AND OTHER STAKEHOLDERS)**

- 5.1 The Cabinet Member for Regeneration and Economic Investment and local Ward Members have been briefed in respect of the issues contained within this report.

## 6 **ALTERNATIVE OPTIONS**

- 6.1 One alternative to exercising the break clause would be to agree the supplemental lease for the additional land as proposed by NRL. This would involve leaving the original Lease in place, and having two arrangements in place. This option is not considered to be favourable, because it creates an additional layer of complexity to the transaction, and does not appear to create any benefit for either party, or meet the Council's objectives.
- 6.2 Another alternative would be to vary the Lease and option to include the additional land therefore extending the option to include the full 0.7 acres of Council land now identified. From a legal perspective this is unattractive because variations of a significant nature to a lease can (in some circumstances) be deemed to be an implied surrender and regrant.
- 6.3 A third option would be to agree a mutual surrender of the existing Lease and the grant of a new lease on terms to be agreed. Agreeing a surrender of a lease, can be a difficult and time-consuming process, and does not afford any significant advantage to the Council.
- 6.4 A final option might be to break the lease and not enter into any further negotiations, the assumption set out in paragraph 3.14 is relevant in that in this scenario NRL may pursue alternative options for securing access to the Proposed Development site.

## **7 STRATEGIC RESOURCE IMPLICATIONS**

- 7.1 Should Network Rail not proceed with their proposals on account of the service of the Lease break this would mean a loss of future rental income and/or a future capital receipt.
- 7.2 There will be no direct impact on expenditure budgets however additional resource will be required to engage in future negotiations and any requisite valuation exercise to inform the terms of a future disposal.

## **8 LEGAL AND GOVERNANCE CONSIDERATIONS**

- 8.1 Such considerations are set out in the main body of the report.

## **9 EQUALITY IMPACT ASSESSMENT**

- 9.1 There is no necessity for an Equality Impact Assessment.

## **10 DATA PROTECTION IMPACT ASSESSMENT**

- 10.1 This report does not relate to the collection of personal information and therefore a privacy impact assessment is not required.

## **11 CRIME AND DISORDER AND RISK ASSESSMENT**

- 11.1 The Corporate Risk Management Strategy (CRMS) will continue to be complied with throughout, in identifying and assessing the significant risks associated with this strategic proposal. This includes (but is not limited to) political, legislation, financial, environmental and reputation risks.

## **12 IMPACT ON ANY COUNCIL MANAGED PROPERTY OR LAND**

- 14.1 The site is likely to be adjacent a future housing development site currently in the ownership of the Council and therefore the terms of any future disposal will need to be negotiated carefully so as to safeguard the optimum development potential of the Council's retained land.

## **13 APPENDICES:**

1. Lease
2. Lease Plan (0.2 acres)
3. Plan illustrating total land now required (0.7 acres)

**Amy Harhoff**  
**Director – Regeneration and Growth**