

SUBJECT:	APPLICATION BY THE BRAYFORD TRUST FOR LANDLORD CONSENT FOR ERECTION OF A RESTAURANT
DIRECTORATE:	CHIEF EXECUTIVE AND TOWN CLERK
REPORT AUTHOR:	CITY SOLICITOR/CHIEF FINANCE OFFICER

1. Purpose of Report

- 1.1 To seek Executive's approval to refuse an application by the Brayford Trust for Landlord's consent to sublet a part of the Pool for the erection of a restaurant ("the Platform").
- 1.2 To approve the granting of a loan to the Brayford Trust on the terms set out in the report, to enable the Trust to have the necessary finances be able to carry out relevant works under the lease.

2. Executive Summary

- 2.1 The Brayford Pool ("the Pool") is subject to a lease dated the 13th January 2010 made between the Council and the Brayford Trust ("the Trust") for a term of 125 years.
- 2.2 In September 2016 the Trust applied for planning permission for a restaurant use adjacent to the Viewing Platform ("the Platform") Planning Officers recommended approval of the development, which was subsequently overturned by members of the planning committee and the application was refused.
- 2.3 The Trust appealed against the decision and on the 2nd October 2017 the committee decision was overturned by the Secretary of State and planning permission was granted.
- 2.4 The Trust have now made an application to the Council as Landlord to give consent to sublet a part of the Brayford Pool for the erection of a two storey building as a restaurant.
- 2.5 Consent is required by the Council as Landlord for any development of the Pool, in addition to any necessary planning and building regulation approval.

3. Main Body of the Report

- 3.1 In January 2010 the Trust entered into a revised lease with the Council for a term of 125 years, and a Management Agreement for the Pool (for five years) which required the Trust to produce a five year business plan for the Council's approval and to account to the Council for the delivery of such.

The trust has made considerable improvements to the Pool since that revised lease was entered into.

3.2 The Brayford Trust is both a company and a charity, it receives no external funding and must therefore raise funds itself in order to carry out the obligations under the lease. Councillors Metcalfe and Murray are the City Council's representatives on the Trust and Councillor Metcalfe is the Chair.

3.3 The lease sets out a number of obligations for the Trust such as:

- To manage the Pool in accordance with the Trust's charitable objectives
- To keep it open and available for recreational use by the public
- To provide moorings
- To keep the Pool in good condition
- To keep it free for rubbish and litter and free from weeds
- To maintain, and where necessary, to shore up and pile the natural banks
- To use reasonable endeavours to ensure a sufficient depth of water for navigation by dredging the Pool

3.4 In October 2014 the Executive resolved to approve the Trust's five year business plan. The report noted that officers had assessed the financial information contained in the plan and concluded that the Trust would be able to continue to operate the Pool at a modest level for the next five years. It was further noted that it would be necessary for the Council and other partners "to help the Trust through activities such as sourcing alternative funding in order to deliver further improvements."

3.5 In relation to moving forward, the Trust has advised that the urgent priority in the short term is the implementation of Phase 3 of the moorings development. The Trust has stated that when the current business plan was agreed no problems with implementing phase 3 were anticipated, however they now say that this was optimistic. Silt and weeds have accumulated faster than anticipated with the result that there is insufficient depth of water in parts of the moorings, such that some vacant moorings cannot be re-let. The Trust state that this problem will only get worse, particularly if high water levels are experienced. The result of this will mean loss of moorings and therefore loss of income. The trust have concluded that it is imperative that this work must be carried out before the 2018 boating season.

3.6 The Trust has also informed the Council that there are other works also requiring urgent attention these being continued silting and the deterioration of the South Bank.

4. Resources Available to the Trust and Financial Proposals

4.1 As indicated above, the Trust receives no external funding source to carry out these works and must therefore try to raise the necessary finance itself.

4.2 Specific details of how the Trust are considering financing these works are set out in Appendix 1 to this report. Appendix 1 contains exempt information as defined in Schedule 12 A of the Local Government Act 1972 and is therefore not for publication.

5. Planning Background

- 5.1 In September 2016 the Trust applied for planning permission for the erection of a two story building for the purpose of A3 (food and drink) and refurbishment works to the Viewing Platform. The restaurant would be attached to the existing public viewing platform.
- 5.2 Planning Offices recommended approval for the development, this recommendation was overturned by the planning committee and the application was refused. Planning Committee refused the application on the grounds that this was contrary to local plan policy 46, that by virtue of the siting of the development it failed to adequately preserve the Pool as a protected open water feature; and that it would create a feeling of enclosure and prevent unrestricted views of the Pool.
- 5.3 The Trust appealed this decision, and permission for the development was granted on appeal by the Secretary of State on the 2nd October 2017. The Inspector's view was that it would not unduly harm the open nature of the pool or materially restrict views and would not lead to a sense of enclosure.

6. Application under the Lease

- 6.1 The Trust has now applied to the Council as Landlord for permission to sub-let part of the Pool to enable the Platform development. Under the lease with the Trust it provides that the Trust shall not "develop...the Property or any part thereof without the Council's prior written approval (such approval not to be unreasonably withheld or delayed) in addition to any approvals and requirements for Town and Country Planning and Building regulations....."
- 6.2 The Trust also makes the application under the lease, so far as relevant to the proposed development, that the Trust shall not "underlet ...the whole or any part of the property ...other than way of sub-lettings or occupational licences.." this is subject to conditions, including a condition that no sub-letting shall be for a contractual period to be in excess of 15 years.
- 6.3 The Trust's proposed sub-lease for the Platform development would be for the remainder of the main lease term being 115 years

7. Property Services

- 7.1 Initial views of the Strategic Property Services Manager on the Trust's application is that as Landlord, the Council would wish to keep the open appearance of Brayford Pool in line with the recently adopted public realm strategy and in accordance with the lease terms to Brayford Trust.
- 7.2 It is also important than any permitted sub-lettings continue to be on a rental basis rather than a premium/peppercorn arrangement so as to ensure that an income stream is available should management of the Pool return to the Council in the future. Any proposal by Brayford Trust to convert the rental income into a premium payment would result in a reduction of the value of the Council's interest and is therefore unacceptable.

- 7.3 It is considered that there are reasonable grounds to refuse the application as Landlord for the grounds outlined in paragraph 7.2. When considering the duty of reasonableness, the Council can take into account its own interests to determine what is reasonable, the interest here being the financial impact should the Pool return to the Council.

8. Financial Information

- 8.1 As indicated in Appendix one (exempt under Schedule 12A LGA 1972), the Trust have set out as part of their application, what their current financial position is. This is to give further evidence that without the injection of cash from the proposed Platform development, they would have no resources to carry out their required works under the lease, most notably the dredging works.
- 8.2 The Chief Finance Officer has undertaken a financial assessment on the Trust's finances which indicates that since the Business Plan was approved by Executive in 2014 that the net profit, for the years covered by the annual accounts, has increased as follows –

	2014/15	2015/16	2016/17
	£'000	£'000	£'000
Profit/ (loss) as per Business Case	(19)	(5)	11
Profit as per published accounts	46	76	73
Net profit increase	65	81	62

This would indicate that the Trust would have sufficient resources to be able to finance a loan from the Council to fund phase 3 of the development.

9. Meeting with the Trust

- 9.1 On the 4th of January officers met with relevant representatives of the Trust in order for officers to get an absolute understanding of the Trust's financial position and the clear position that the only reason that the Trust was pursuing the Platform development was to source the necessary finances to carry out the required obligations under the Trust.
- 9.2 There was also a very initial discussion as to the feasibility of the Council loaning the funds, as indicated in paragraph 9.1 to the Trust in order that they could carry out their lease obligations on what is essentially a Council asset. In addition offering an annual grant to the Trust of approximately £25,000, which the trust have advised would be the annual rental income from the Platform development.
- 9.3 Officers view is that if, as the Trust indicate, the only driver for the Platform development is to fund the urgent works required under the lease, then a loan from the Council would be an entirely reasonable way forward. This gives the Trust the much needed funds to carry out the works and continues to protect the Pool as an open waterway as far as possible.

10. Strategic Priorities

10.1 Let's Drive Economic Growth

The Brayford Trust managing the Pool on behalf of the Council is a clear example in achieving economic growth for the City. The Trust have a proven track record since 2010 of carrying out works to the Pool which have significantly improved the area.

- 10.2 It is acknowledged that in order to continue with this economic growth and for the Trust to carry out its charitable objectives for the Pool and leasehold obligations, that funding in some form is required.

11. Organisational Impacts

11.1 Finance (including whole life costs where applicable)

The Council would be able to undertake a loan from PWLB under prudential borrowing at an interest rate of around 2.9% per annum (subject to change).

As outlined in the rest of the report, the Trust have been clear that this additional income is required to enable them to carry out the required dredging works under the lease. Should Executive agree to offer a loan to the Trust then this should be linked to an agreed forward programme of dredging works.

In 2010 before this lease with the trust was signed, the Council had allocated a budget to the Trust of £29,000 to provide support to the Trust. This reduced to £1000 in 2010/11 and once the new lease was entered into the budget was removed. It is proposed to reinstate this budget of up to £25,000 the details of which to be delegated to the Chief Finance Officer.

12. Legal Implications including Procurement Rules

- 12.1 The leasehold requirements of the Trust's obligations are as outlined in report. As indicated, the Trust must seek approval from the Council to carry out any development and to sub-let any part of the Pool.
- 12.2 The lease states that such approval of the above is "not to be unreasonably withheld or delayed". If the Council refused the application under the lease, the Council would have to prove not that we were correct or the decision was justified, only that it was reasonable in the circumstances. In making this decision the Council would be entitled to take its own circumstances into account (for example allowing a premium rather than a rent to be paid by IIL would eventually mean the Council taking the asset back without an income stream.)
- 12.3 The lease states that if there is any difference or dispute between the Council and the Trust, this shall be referred to an independent expert agreed between the parties, failing such agreement it will be referred to an independent expert appointed by the President of the Law Society.
- 12.4 If the Trust consider that the Council has been unreasonable in the refusal to grant consent for the development or the assignment, then they may seek to

recover damages from the Council.

12.5 In relation to any proposed loan, the Council has power to borrow under section 1 of the Local Government Act 2003. The Council also has general power to borrow and make loans under the General Power of competence in section 1 of the Localism Act 2011.

12.6 Any state aid implications would fall into the General Block exemptions, or be exempt as local aid.

In effect however, the monies that the Council would be loaning are to go towards the Council's own asset.

13. Risk Implications

13.1 The Trust have clearly stated that the proposal to sub-let part of the Pool for the Platform development is financially driven.
The Trust are clear that if they don't get this necessary funding they will be unable to carry out their obligations under the lease, most notably the dredging.

13.2 If this situation were to come to fruition this would see the Council in the position of having to enforce the terms of the lease, or the Trust disbanding. This would inevitably mean the Brayford Pool coming back into the direct control of the Council and the Council thereby assuming all the responsibilities of its upkeep.

13.3 With regards the Platform development itself, the Council is fully aware of the strength of feeling this application has created through the planning process and subsequently through the land owner side and any decision may be subject to an application that the decision be judicially reviewed on the grounds that the decision is not reasonable.

14. Recommendation

14.1 That Executive refuse the application by the Brayford Trust under the lease to develop and sub-let that part of the Brayford for the Platform development.

14.2 That Executive approve the granting of a loan to the Trust, the terms of which are delegated to the Chief Finance Officer and to link with an agreed dredging programme.

Is this a key decision?

Yes

Do the exempt information categories apply?

Yes
Appendix A

Does Rule 15 of the Scrutiny Procedure Rules (call-in and urgency) apply?

No

How many appendices does the report contain?

List of Background Papers:

None

Lead Officer:

Carolyn Wheater City Solicitor
Telephone (01522) 873323