



CAI.30 12/13

Challenge and Improvement  
Committee

3 December 2013

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**Subject: Proposed Actions Following the Elswitha Audit Review**

Report by:

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Purpose / Summary:

Members of C&I to agree the post-Elswitha action plan and then present this to the Governance and Audit Committee.

**RECOMMENDATION:**

- (i) Members of C&I establish a task and finish group (to be cross party in nature with a maximum of 5 people) which will draft an action plan for consideration by the Governance and Audit Committee.**

## IMPLICATIONS

**Legal:** The Council currently has a red rating for Corporate Governance. The action plan will ensure that the Council demonstrates greater due diligence in relation to future Investments and regeneration work.

**Financial : FIN/55/14** None arising from the proposed action plan

**Staffing :** None related to this report.

### **Equality and Diversity including Human Rights :**

*NB: A full impact assessment **HAS TO BE** attached if the report relates to any new or revised policy or revision to service delivery/introduction of new services.*

**Risk Assessment :** The risk assessment may be found on the Council's Minerva electronic system. The key risk is that by not implementing the recommendations and actions, the Council will not learn and will not improve future work.

**Climate Related Risks and Opportunities :** N/A

### **Title and Location of any Background Papers used in the preparation of this report:**

Elswitha Audit Review Report presented to G&A 22<sup>nd</sup> October 2013

### **Call in and Urgency:**

**Is the decision one which Rule 14 of the Scrutiny Procedure Rules apply?**

Yes

No

### **Key Decision:**

Yes

No

## **1. Background**

- 1.1 The Council was deemed to warrant a red rating for Corporate Governance in June 2013.
- 1.2 A review of the Elswitha project was presented to the Council's Governance and Audit Committee (G&A) on the 22<sup>nd</sup> October 2013. The report makes a number of recommendations which will improve the Council's approach to Corporate Governance; in particular, how the Council approaches regeneration and investment in the built environment.
- 1.3 The G&A Committee has requested that Challenge and Improvement Committee draft an action plan which addresses the auditor's recommendations. C&I Committee are then invited to report back to G&A Committee
- 1.4 A Corporate Governance SMART Action Plan will be presented to G&A Committee on the 21 November 2013. A section of this action plan will cover actions in relation to the Council's approach to Investment. This will be updated to incorporate actions pertaining from the Elswitha Audit and proposals from the C&I Committee which are approved by the G&A Committee.

## **2. The Auditor's Recommendations**

- 2.1 The recommendations focussed upon the following areas:
  1. Project Initiation and Management
  2. Managing Contacts with Potential Developers
  3. Evaluating Proposals.
  4. Valuing Council Land for Disposal
  5. Communication with Councillors
  6. Clarity of Published Information
  7. Stakeholder Engagement
- 2.2 A copy of the Auditor's Report is attached as Appendix 1



## **Internal Audit Report**

## **Elswitha Quarter Development**



**Date: 10<sup>th</sup> October 2013**

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**Auditor** John Sketchley

**Head of Audit** Lucy Pledge CMIIA

<b>Distribution</b>	Chief Executive Chair of Governance & Audit Committee External Auditor
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# Introduction and Scope

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1. We have undertaken a review of the Elswitha Quarter development at the request of the Chief Executive and Chairman of the Governance and Audit Committee.
2. The development forms part of the Council's strategy for the long term regeneration and growth of Gainsborough. The aim of the development was to offer the potential to create a strong destination in the traditional town centre which will complement Marshalls Yard and rebalance the town with the Market place at the centre. The project would also remove the obligation on the Council to pay for maintenance and National Non-Domestic Rates of around £50k per annum on the Old Guildhall.
3. A judicial review was lodged against the Council at the end of December 2012 around the lawfulness of the Council's decision making process. Whilst this was rejected by the High Court on a number of grounds, the Council wanted to identify how it might strengthen its governance arrangements and commissioned an Internal Audit Review.
4. Our review has focussed on how the project was managed, from its inception in September 2010 through to the rejection of the Judicial Review in January 2013, with an aim of:
  - Enabling the Council to look openly and critically at processes and decisions made to see whether the Elswitha Quarter development indicates that changes could and should be made to policies and practice.
  - Identifying how these changes will be brought about.
  - Identifying examples of good practice that can be built upon going forward.
  - Identifying areas where the Council's governance arrangements may need to be strengthened
5. Our review examined the evaluation process adopted for the developer submissions; however we did not verify the authenticity of the scores or the viability of the financial evaluations.

## Approach

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6. To address the above we considered the following key areas:
  - Decision making process
  - The level of member engagement
  - Due diligence on procurement approach
  - Competencies, training and management accountability
  - Consideration and compliance with Council constitution, policies and procedures.
  - Risk management

- Project management
  - Working relationships
  - The Council's response to the Judicial Review
7. In undertaking this review we interviewed and received information from a number of officers and members – including those on Prosperous Communities and Policy & Resources Committees. All members were also given an opportunity to comment by email.
8. We did not interview the officers primarily responsible for the development during 2011 as they have since left the employ of the Council, although one did provide a statement for the Council's defence of the Judicial Review and we have been provided with a copy. We also did not interview the Project Managers responsible for the development during much of 2012 due to both being off on maternity leave. We feel that sufficient and relevant information has been obtained through other sources to inform our findings.
9. We obtained and reviewed various documents held by the Council on the Elswitha Quarter development including committee reports, letters, emails, internal reports and notes of meetings as provided to us by officers.
10. We made reference to formal Council documents as necessary, in particular the Corporate Plan, the Constitution and draft Commercial Strategy. This strategy sets out how the Council will embrace the Entrepreneurial Spirit – Developing a Commercial Focus. It outlines how the Council intends to realise its vision by investing in the right things, maximising return and benefits on that investment. The document identifies the importance of having:
- Clear management standards and guidance
  - Due diligence and business information
  - The right team to deliver
- The Commercial strategy is scheduled to be approved by members in November 2013 – once this document has been approved it will provide clarity of expectations and can be used to help inform the basis of any improvements identified in this report. During 2012 officers have received training on some elements of the strategy eg what makes a good business case.
11. Where appropriate we obtained good practice and / or technical advice from Procurement Lincolnshire and Legal Services Lincolnshire.
12. Finally we took account of other work and documents we have recently produced that makes reference to the Councils overall control environment, including:
- Investment Decision audit
  - The Head of Internal Audit's Annual Report
  - The Annual Governance Statement

# Background

13. In January 2008 the Council moved to new offices in Marshall's Yard leaving empty its former main office which we shall refer to as the old Guildhall.
14. At that time in 2008 a development brief was prepared for the old Guildhall site and three submissions were received. A preferred developer was selected, and negotiations began to resolve the final contract details for the sale and transfer of the site. Unfortunately, due to the onset of the recession, the site transfer did not proceed and with no further interest the old Guildhall remained empty.
15. The Elswitha Quarter, as defined by the development brief, included vacant land, open space and the vacant former Guildhall building which was costing the Council around £50k per annum in NNDR and maintenance. It is a Council priority to remove this cost to the Council and achieve a value for money solution.
16. A renewed attempt to develop the site commenced in September 2010. The table below shows the timeline of the key events from September 2010 to the present:

<b>Date</b>	<b>Event</b>	<b>Details</b>
9 Sept 2010	ATLAS facilitated workshop	Stakeholder event to help form a vision and develop ideas for the site
13 Jan 2011	Organisation and Resources Committee	Committee approval of the development brief
March 2011	Development Brief published	Development brief made available to interested developers
March – July 2011	Market testing as agreed by the Organisation and Resources Committee	Development brief published on the Council's website, promoted at the Lincolnshire Show and circulated around developers who had previously shown an interest in the town
29 July 2011	Proposals requested	Developers asked to return proposals by 26 Aug 2011
26 Aug 2011	Proposal closing date	Proposals received from three developers
7 Oct 2011	Clarity day 1	Meeting with developers to clarify proposals
20 Oct 2011 4 Nov 2011	Clarity day 2	Meeting with developers to clarify financials
23 Feb 2012	Prosperous Communities and Policy and Resources Committees	Committee resolutions on the 'potential development partner' and to demolition of old Guildhall
24 Sept 2012	Prosperous Communities and Policy and Resources Committee	Committee resolutions on the sale of land to the 'potential development partner' for construction of a hotel on



Date	Event	Details
		Whitton's Gardens
28 Nov 2012	Judicial review request submitted	The unsuccessful developer submits a request for a Judicial Review against the Council
17 Jan 2013	Judicial review request refused permission	The Courts determines that the Judicial Review will not be allowed
Feb 2013	Extraordinary Council Meeting	Audit Lincolnshire requested to review the Elswitha Quarter development

### **Summary of Events**

17. The renewed attempt to develop of the old Guildhall site, to become known as the Elswitha Quarter, commenced in September 2010 with a workshop of stakeholders facilitated by ATLAS, the Government's advisory team on large planning applications. The purpose of the workshop was to develop a vision and ideas for the use and development of the old Guildhall site. A range of stakeholders were invited to the workshop, including the Town Council, District and County Councillors who represent the town, the leader of the Council, the leader of the Liberal Democrats, County Council officials, the Trinity Action Group, the South West Ward Residents Association and the Gainsborough Development Trust. We cannot confirm who attended.
18. The vision and ideas from the workshop were brought together in a draft development brief. This was presented to the Organisation and Resources Committee in January 2011 who resolved 'that the revised development brief and marketing approach for the Elswitha Quarter be approved'. The marketing approach was:
  - The new development brief will be used to promote and market the site
  - Officers will target selected developers and investors
  - Wider promotional opportunities will be considered through selected trade fairs and exhibitions in the UK
19. The draft development brief as presented to Committee was put together as a colour brochure and copies became available in March 2011. As approved by Committee the brief was made available to interested developers at the Lincolnshire Show, via the Council's website, and through contact with developers who had shown an interest in the Gainsborough Regained plan. There was direct contact with 12 developers, and expressions of interest from 6.
20. Towards the end of July 2011 the interested developers were issued with details of the criteria on which the Council was to evaluate their proposals with a request to submit their proposal by 26<sup>th</sup> August 2011. These details also included details of Council land ownership in the area and title information. Information on the covenants on Whitton Gardens was sent out a couple of weeks later. Three proposals were received from Developers 1, 2 and 3.
21. Officers evaluated the proposals using the criteria that had been issued and separately assessed the financial aspects of the proposals. Two clarity days

were held in October/November 2011 when officers met with representatives of Developers 2 and 3 (Developer 1 having withdrawn by this stage) to explore their proposals.

22. Following the clarity days the developers were given an opportunity to submit amended proposals and financial information to address any issues that had been identified.
23. A review of the Council's management structure took place in the summer of 2011 which resulted in changes in the leadership and project management of the development which took effect at the end of 2011. These officers reviewed what had been done so far and sought legal and procurement advice on the processes followed.
24. Having evaluated the proposals and taken legal and procurement advice a course of action was decided which would allow the development to proceed and minimise the risks. The decision to proceed was based on this advice and the corporate priorities of regenerating Gainsborough and reducing the cost of maintaining the old Guildhall. The Leader and Chairman of the Committees' were briefed on the recommended way forward and special meetings of the Prosperous Communities and Policy and Resources Committees took place in February 2012. The Committees resolved:
  - Based on the regeneration aspects of the proposals received the Committees consider that the proposal submitted by Developer 2 best meets the evaluation criteria and that Developer 2 is selected as the potential development partner for this stage of the project.
  - Subject to the necessary planning process being followed, the demolition of the former Guildhall building be approved.
  - The Chief Executive be authorised to:
    - lead the negotiations with the potential development partner,
    - hold briefings with the Chairs of Prosperous Communities and Policy and Resources Committee,
    - take appropriate legal and procurement advice and
    - refer the project back to members when the project is ready to move to its next stages
25. Following the Committee meetings a Project Team, Internal and External Project Boards, and a Member Steering Group were established and discussions were progressed with the 'potential development partner'. This resulted in a report to special meetings of the Prosperous Communities and Policy and Resources Committees in September 2012 where further details of the proposed development from the Potential Development Partner (Developer 2) were provided. It was resolved that:
  - The sale of the land at Whitton's Gardens to the potential development partner for the purposes of the development of a hotel in accordance with the financial terms outlined in the report. This to be at the best consideration reasonably obtainable.
  - The continuation of discussions with the potential development partner on an exclusive basis for a period of not less than 24 months to attract a cinema and other operators of cultural and leisure facilities to the site of the former Guildhall, be authorised.

- The landscaping of the former Guildhall site once the building is demolished, be approved. The details of which will be finalised by officers.
- Authority be delegated the Director of Regeneration and Planning authority to negotiate and approve the entering into of all documentation necessary to give effect to the first resolution.
- West Lindsey District Council investigate potential opportunities around investing in the end development.

Legal advice was provided at this stage of the development and included in the report.

26. In November 2012 Developer 3, being dissatisfied with the Council's decision, submitted a request to the Courts seeking to apply for Judicial Review against the Council. This was defended by the Council and in January 2013 the Courts refused Developer 3 permission for a Judicial Review on the grounds that:
- The claim was out of time
  - The case failed on its merits
  - There was never any question of Developer 3 submitting a scheme that involved the erection of a building on Whitton's Gardens
27. Five members requested an Extraordinary Council Meeting in February 2013 to understand the points raised by Developer 3 in their request for a Judicial Review and ascertain whether or not decisions made, or actions taken, in respect of the Elswitha Quarter development had been made legally. The key concerns raised by members were that:
- The project changed after the initial bidding process in such a way that the potential partners may have been disadvantaged.
  - The project changed after the initial bidding process to include Whitton Gardens, but that all potential partners may not have received any or sufficient written information to advise them of this, so leaving the Council open to legal challenge.
  - The bidding process for the development may be flawed.
  - Members of the Council are not being given sufficient information about the project to make informed judgements.
28. The meeting took place in February 2013 and it was agreed that the Governance and Audit Committee oversee and receive an audit report commissioned from Lincolnshire Audit.
29. At the time of writing this report demolition of the Guildhall has commenced and is in progress. Development of a hotel has not been secured as new specification requirements from the operator mean the development is not currently feasible.

# Executive Summary

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30. We found that the Council showed positive intent to develop the empty old Guildhall site and through it assist in the regeneration of Gainsborough town centre and save the Council of on-going expenditure of around £50k pa. The members and officers involved worked hard to ensure a successful development.
31. In the initial stages of the development (March to July 2011) insufficient thought was given to how the Council could secure the outcomes it was seeking to achieve and the nature of the process that should be followed in order to do so. Therefore whilst in itself not unlawful or in breach of the Council's contract regulations, the initial chosen process was not fit for purpose to lawfully secure certain outcomes and did restrict the Council's options in the later stages of the development.
32. Obtaining specialist advice too late in the process could have had more serious ramifications – evidence shows that officers in the initial stages of the development substantially followed a 'procurement' process and could have caused compliance issues with both the Council's contract procedure rules and EU procurement regulations.
33. Following the change in project management progress was reviewed from a legal and procurement perspective and advice was sought as to the options for continuing with the process already commenced and arriving at a lawful conclusion. A solution was formed that enabled the development to continue rather than restart the process whilst minimising perceived risks. It also enabled the demolition of the old Guildhall thus saving the Council the maintenance and NNDR costs of approximately £50k per annum.
34. It is our view that Committees should have been presented with more detailed information on the proposals in February 2012. This would have helped them to fully understand all the risks and support a robust informed decision. It would also have kept them informed of the issues Officers faced during the latter stages of the development and how all risks were being managed / minimised. Whilst we do not believe officers intentionally misled the Committee, the omission of some key information represented a risk to the Council's decision making process and could have potentially undermined officer and member relationships.
35. Members rely on officers following proper processes and presenting accurate information when they are asked to make a decision. Our examination of the quality evaluation identified some minor inaccuracies. Whilst these errors did not change the result of the 'winning' proposal officers failing to draw these differences to the Committees attention is a risk to robust decision making and could undermine confidence that proper processes have been followed.
36. Our review identified a significant variation in one person's scores when compared to the other three scorers. Whilst it is acknowledged that it is not a requirement to moderate all evaluation processes and is a matter of

judgement in each individual case - given the size of the difference between the scores - it is our view that moderation in this case would have led to a more robust evaluation and increased confidence in the outcome. This view is shared by Procurement Lincolnshire.

37. Financial evaluations were undertaken on developer submissions to assess their financial viability. As the submissions were very different from each other it was found to be difficult to undertake a financial comparison. Officers therefore used the quality evaluation process to request members to decide on the potential development partner. Further information on the final financial proposal was provided at the September 2012 meeting, however the report did not provide information on the risks associated with the proposal.
38. Members were therefore asked to make a decision without knowing the full financial risks and rewards associated with the evaluated proposals or the final proposal presented in September 2012. In order to take a well measured risk decision the Committee needs to understand the keys risks and impact associated with that decision.
39. From some of our discussions there appears to be a view that robust controls can stifle entrepreneurialism. This is far from the case, as only from the bedrock of robust process can an entrepreneurial spirit flourish. The Council's draft Commercial Strategy emphasises the importance of clear management standards and guidance, including:
  - Good governance, project and programme management
  - Project appraisal
  - Business intelligence & research
  - Marketing and business development
  - Due diligence and business information

It is apparent that the above were not fully adopted for this project and management are taking steps to strengthen project governance to ensure compliance.

40. Our key findings are:
  - The initial stages of the development were not fully thought through as to the process to follow to achieve the development outcomes and consequently restricted the Council's options in the later stages of the process.
  - Evidence shows that officers in the initial stages of the development substantially followed a 'procurement' process. The actions taken during this time restricted the options available to the Council later in the process. Legal or procurement advice was not obtained at the outset.
  - Legal advice was taken from Legal Services Lincolnshire in January 2012 (after the evaluation process). This recognised the risk of procurement breach but identified the potential for proceeding with the same process whilst structuring the deal as a land sale. It is clear that the initial stages of the process did restrict the action the Council could

take and stay within the law. However at no time did the Council act unlawfully and it did not breach its own contract procurement rules.

- The processes followed during July – December 2011 could have caused compliance issues with both the Council's contract procedure rules and EU procurement regulations.
- Engagement with developers in the initial stages (March 2011 – July 2011) was not done in a controlled way and could have undermined the process.
- The quality evaluation contained inaccuracies in the final scores. Whilst not affecting the end result it did show a lack of due diligence by officers on the completeness and accuracy of the information being presented to Committees for decisions to be made. These differences were not highlighted to the Committee – they should have been.
- A financial evaluation was undertaken by both the Council and the Council's Agents. Whilst both proposals were assessed as viable they were not scored. Members were not fully informed of the risks and rewards were identified with each submission – they should have been.
- When the officers managing the project changed it was a reasonable expectation that officers checked the evaluation model for completeness and accuracy given the history and issues identified with the project during the initial stages. This would have prevented inaccurate information being presented to the Committees.
- Some Committee members considered that they were not given all the information required to make a robust decision however there is no indication that they requested more information or asked for the decision to be deferred.
- Not all Committee members had the same information / level of knowledge of the development. The Chair and Vice Chair had a more detailed briefing which is normal practice but consideration should have been given to other member information requirements.
- The decision to engage with a single 'potential development partner' caused some confusion and it was not clear to some members where the Council was in the process. However there was an attempt to clarify in an email to all members from the Director of Regeneration and Planning on 20 March 2012.
- There was no effective project management process prior to February 2012. Subsequent project management arrangements could also have been more comprehensive given the significance of this project.
- The role of the member steering group was not clear beyond the few that were involved and its work was not reported back to Committee or political groups. Although not part of its terms of reference, given the significance of the development, it would have been advisable for the Steering group to report back more formally to Committee.
- All members of the Committees were not made explicitly aware of the issues with the initial stages of the process (March to August 2011), although this advice informed both Committee reports. However a process was described in the Committee report to 23 February Committees which minimised the legal and procurement risks.



- Members were not in a position to offer sufficient challenge, particularly at the Committee meetings in February 2012. This was largely due to the fact that some members were unclear of where the Council was in the process and did not know what they were challenging. More information on all potential options and risks associated with each (including not to proceed) could have been provided to members – which in our view – may have ensured a stronger level of scrutiny to support the decision making process.
- Whitton Gardens is land that the Council can use for development. However the wording around Whitton Gardens in the development brief was ambiguous and the process that was followed meant that some members did not realise that Whitton Gardens was available for development until the September 2012 Committee meetings.
- It is clear - from the number of strongly held and inconsistent views on the use of Whitton Gardens - that the precise role and availability for its development within the overall development could have been made clearer at a number of stages.
- There is a risk that the sale of land to a single party could be challenged unless the Council can demonstrate that it is receiving the best consideration reasonably obtainable or it has obtained the Secretary of State's consent. This was set out in the Committee reports of September 2012 and reflected the legal advice obtained.
- Although the valuation from the Council's agent is considered to be robust in the circumstances of this development it would have been prudent for the Council to have obtained at least one more valuation from another valuer.
- Officers had legitimate concerns about member contact with Developer 3 during the Judicial Review process and in this instance took appropriate action to protect the interests of the Council.
- Some Members did not fully consider their role as a Councillor to protect the interests of the Council - when they were making contact with a litigant and when there was a threat of a Judicial Review.

## **Management Response**

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### **Leader and Chief Executive**

This report was commissioned by the Council to examine the issues associated with this project and to learn from the process so that the quality of future projects can be improved. This report is to be welcomed.

There is no doubt the report represents a detailed and comprehensive piece of work and by embedding its recommendations in the work of the Council the quality of projects will improve and the risks around them reduce. The Council has been on a journey in the last couple of years, moving from a deliverer of services and an administrator of projects to an initiator and deliverer of projects in a commercial and entrepreneurial manner. This means that some of the recommendations in the report have already been taken on board as the events set out in it took place over

the period 2010 to 2012. However there are areas which still need to be addressed, for example:

- Cross party briefings on major issues will help member understanding of these issues and lead to more robust decision making
- More comprehensive engagement with stakeholders at the key stages of projects will improve the quality of schemes and identify those issues which need further work
- More note should be taken at appropriate stages of the concerns being raised and there should be a method through which soundings from councillors can be taken
- Committee reports should always contain a full range of options for members, including those around pausing the project or deferring it for further information

However it is also clear that the report has highlighted other aspects of the project:

- The Council has not acted unlawfully and has already changed the way it operates so that the key issues identified could not happen again.
- It has enabled the old Guildhall to be demolished
- There has to be a balance between the commercial sensitivity of Council projects and transparency
- The Council did involve legal and procurement advice and this led to the selection of the approach adopted to achieve the objectives it has for the town.
- Good practice has been identified upon which the Council can build.

The overriding desire of the Council in pursuing this project has been to improve Gainsborough for its residents by enabling the development of high quality facilities. We will continue to vigorously pursue this objective whilst having regard to the recommendations set out in the report.

## **Comments from the Statutory Officers of the Council**

### **Section 151 Officer**

The report clearly demonstrates a need to follow a robust process that supports the delivery of the expected outcomes. In order to do this a clear vision is required at the outset. In my view suitable financial evaluation was carried out; however I take on board the audits findings about including this within the final committee reports.

### **Monitoring Officer**

It is clear that colleagues from internal audit have carried out a comprehensive review of the project. I do not believe that there are any legal issues around the work carried out on the project. That said there are two key issues that the report raises in respect of the relationships and behaviours of both officers and members. The first learning point is officers need to provide sufficient information to allow members to make a fully informed decision. Secondly it is a concern that a number



of members contacted a litigant prior to and during a legal process. As Monitoring Officer I would propose that a more proactive approach with members when dealing with a project of this size and nature.

## **Introduction**

The processes described in the report took place between 2010 and late 2012. Since then the Council has implemented a programme of training and learning that has resulted actions being taken to address the principal issues set out in the report.

For example legal and procurement advice is now always taken at the inception of a project and for more significant schemes legal and procurement staff are members of the project team, commercial and project management training (including the development of business cases) has taken place and further systematic training on procurement and the writing and evaluation of business cases is scheduled through the "Finance Matters" programme.

Sometimes making a decision around project implementation and achieving value for money involves balancing benefits and risks. In these cases a judgement needs to be made. In the case of the Elswitha project the principal judgement that needed to be made at the beginning of 2012 was between the risk of carrying on with the project (mainly about the constraints around the type of deal which could be struck with a developer to ensure the Council acted lawfully) and the benefits the project could bring to the town (badly needed hotel, quality schemes, demolition of the Guildhall and the removal of an on-going costs liability). This needed to be balanced against the risks associated with ending the project at that time (loss of quality schemes, on-going cost liabilities and no guarantee that other schemes of such quality would come forward in the prevailing economic climate, potential for the developers to seek compensation from the Council for the costs they incurred in developing their proposals) and the benefits of ending the project at that time (more flexibility in the type of deal which could be made). These judgements can be finely balanced when it comes to value for money.

This management response will focus on the principal issues and respond to them. In summary these are:

1. Project Initiation and Management
2. Managing Contacts with Potential Developers
3. Evaluating Proposals.
4. Valuing Council Land for Disposal
5. Communication with Councillors
6. Clarity of Published Information
7. Stakeholder Engagement

## **Project Initiation and Management**

The initial stages of this project were inadequately thought through and this constrained the options Council had when it came to making a decision about how to take either of the proposals forward. There was nothing unlawfully about the process started in 2011; however it limited the Council to concluding a "land deal" with a potential development partner and not anything more innovative. In this case a land deal would have met the objectives of the development, namely to provide

Gainsborough with additional leisure facilities, help to regenerate the town and remove the costs associated with retaining the old Guildhall. This was the basis of the judgement made to proceed with the project at the beginning of 2012 when the deficiencies in the process were identified.

The deficiencies in this process were recognised during a review of the project at the end of 2011, where of the new Director of Regeneration and Planning was tasked as one of his high priorities to look robustly at the Elswitha project and put in place all necessary measures to bring the project to a successful conclusion.

### ***Learning***

The Council's project management processes already address this issue by ensuring that all project initiation processes identify what the project is seeking to achieve and how that will be achieved. Additionally all projects follow an appropriate methodology with the objectives of the project being clearly identified at the project initiation stage.

### **Managing Contacts with Potential Developers**

At the start of the process contact was limited to a single developer that responded to the publication of the development brief in March 2011 (prior to the start of the formal selection process). That developer was given information on request and was also able to promote a particular approach to developing the area to officers. This took place prior to the publication of any formal invitation to submit proposals.

Once formal proposals were received the contacts with developers were formalised: with all developers being issued with the same information about the site and how the selection process would be managed. Face to face contact with developers was limited to the clarity days which took place in the autumn of 2011. Both developers were given the same information at these events and were asked for the same additional information.

Member contact took place with the unsuccessful developer leading up to and during the judicial review. Whilst Members might have acted with good intentions in terms of supporting a local business partner, contact with this developer at that time was inappropriate. Councillors have an obligation to safeguard the position of the Council where legal proceedings are either threatened or in progress. Contact at this time could have damaged the Council's case through the judicial review process.

### ***Learning***

All officer contact with developers will be controlled and documented. Whilst all Members were informed in writing about their obligations once the judicial review application had been submitted and during the extra-ordinary council, it would be useful to reinforce this with further Member development and guidance including reminders at key stages of projects that might carry a high risk, whether this is commercial or otherwise. Culturally the Leader is emphasising to the Council that management's role is to enable them to be effective councillors and provide as much information as possible in line with the principles of transparency. However there are times when information may be confidential and communicated to

members on a “need to know” basis. Members are asked to understand the officer responsibility towards the Council as a body corporate in preventing undue risks and ensuring value for money.

Through the Group Leaders’ meeting decisions will be made as to the nature of member development that should take place, to ensure that members are aware of what constitutes appropriate contact with developers or litigants and their duty as a Councillor to protect the position of the Council where legal proceedings are underway.

### **Evaluating Proposals**

At the start of the formal process of advertising for proposals (July 2011) a pack was sent to all interested developers that included the approved development brief, a description of how proposals would be evaluated, title information and a proposed timeline.

On receipt of the proposals (August 2011) they were evaluated by four officers against the scoring criteria sent out in the packs. A separate financial evaluation was also carried out. The proposals received were very different from each other both in their approach to developing the site and the financial models they proposed. In order to understand each approach two clarity days were held. After the clarity days further financial information was submitted. It was clear at this stage that each of the proposals was viable financially; however one developer scored higher on the evaluation process. The developer that scored higher on the evaluation was the one that was recommended to the Committees to become the potential development partner. Having taken advice it is clear that there is not necessarily a specific requirement to “moderate” scores as part of a robust evaluation process. It is a matter of judgment in each case. In this case and with hindsight it is clear that some form of moderation would have been useful or in the absence of moderation the reasons for not going through a moderation process clearly recorded.

It is accepted that there were some minor inaccuracies in the scores presented in February 2012 and a process of proofing reading the final draft of the Committee report should have taken place. All aspects of the project processes were reviewed at the end of 2011 and the same due diligence should have applied to a reassessment of the scoring process as it did to other elements of the project at that time. It is however noted that the inaccuracies did not affect the outcome of the process.

### ***Learning***

Whilst the process did follow a process in terms of evaluating the proposals, advice and guidance published by Procurement Lincolnshire should be followed in future to ensure that scores are moderated where that is justified by the scale of the proposal or the variations in the scores merit this approach.

A robust system of proof reading reports should be introduced to ensure that minor inaccuracies are identified and corrected prior to the report being considered by a committee.

### **Valuing Council Owned Land for Disposal**

Throughout the process the Council used its then retained agents for land and property advice (including valuation advice). The intention to do this was set out in the report to the Organisation and Resources Committee in January 2011. Legal advice taken indicates that it is not necessary to obtain more than one valuation in order to establish that the Council is complying with section 123 of the Local Government Act 1972. The important point is to ensure that the valuation is robust. In relation to the valuation of Whitton's Gardens three valuations were received from the Council's retained agents – including one which expanded the method that was used to calculate the value of the land. This is considered to be a robust approach to the valuation of the land and reflected the Council's own experience of land values in the area. Also in terms of section 123 even if the Council is satisfied with the valuers three separate valuations this would not have matter as it would have been covered by the Secretary of States "general disposal consent".

### ***Learning***

Ensure that the Council receives a robust valuation whenever it is disposing of land on the open market to ensure that it complies with section 123 of the Local Government Act 1972.

### **Communication with Councillors**

Information was given to members in different ways throughout this project: through Committee reports; through briefings given to committee chairs; through briefings given to the leader's panel; through briefings given to the leader and through the member steering group.

The Committee reports were concise and contained sufficient information in order for members to make a decision; this is confirmed by the report's findings. It is accepted that they should have contained more information on the options available to members (including information around rejecting all the proposals or deferring consideration of the proposals for more information or advice).

It is accepted that the Leader and Committee chairs understood the progress with the project, the position around procurement and the risks involved. However other members might not have been in the same position as they do not attend Committee Briefings and are not members of the Leaders Panel.

The member steering, whilst having clear terms of reference and a cross party membership failed to communicate with the rest of the council members on this issue. It is accepted that once this was seen to be happening by officers and members measures should have been put in place to re-engage other members. It should also have reported back to the parent Committee during the development phase of the project

### ***Learning***

The officers should ensure that Committee reports contain all the options available to the Councillors at Committee including those of rejecting the proposals or deferring consideration of the proposals for the submission of further information. Committee reports have now been changed to ensure that they include appraisals of all realistic options. Where members' steering groups or sub committees are set

up members should ensure that relevant information is fed back to their groups, officers should ensure that members are engaging with the process and take action where this is not happening and regular progress reports on the work of the group should be submitted to the parent committee.

### **Clarity of the Published Information**

The development brief for the Elswitha Quarter was published in March 2011. It was a professionally produced document that defined the area for development and set out a list of uses which would be acceptable in the area (including a hotel). It also described the role of Whitton's Gardens. Nowhere does the brief specifically preclude development of Whitton's Gardens. Both developers proposed developing the Gardens (a hotel on part of the land in one proposal and a 96 space car park across the majority of the land in the other).

It has always been clear that Whitton's Gardens was available for development, at least in part. It was equally clear that part of the Gardens needed to be retained as open space to enhance the setting of Elswitha Hall and the views out into open countryside.

### ***Learning***

Pilot any potential development brief internally to ensure there is no ambiguity in the wording and alter any brief as result of this piloting.

### **Stakeholder Engagement**

Stakeholder engagement began this process with a workshop (facilitated by the Government's ATLAS team) held in the Council Chamber in September 2010. It was that workshop which shaped the development brief considered by Organisation and Resources Committee in January 2011. It is difficult to see given the issues of commercial sensitivity around the submission of the proposals in this process where further stakeholder engagement could have taken place. However as the scheme approved on September 2012 moved towards implementation further stakeholder engagement was to be planned ahead of the formal submission of a planning application and during the planning application. Pre-application engagement would have including such things as the layout of the public open space, design of the public art and the design of the hotel building. It is accepted that it would not have included the principle of using part of Whitton's Gardens for a hotel.

### ***Learning***

As part of project planning ensure that adequate and appropriate time is allowed for effective and meaningful public engagement which would allow any project to be altered to reflect the results of that engagement.

### **Conclusion**

This report has highlighted key learning points for the Council. However it needs to be emphasised that the principal drivers for the project, which governed how it was conducted, was the desired to regenerate Gainsborough for the benefit of the

people of the town in the long term and to rid the Council of the expense of maintaining the old Guildhall. This was done against a backdrop of a shrinking economy and falling investment in construction which necessitated keeping alive developer interest in providing a much needed hotel in the town centre.

# Findings

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## Selection of Potential Development Partner

### *Findings*

41. The report to the Organisation and Resources Committee in January 2011 states that there are no legal implications to the proposed way forward. We found that neither Legal Services Lincolnshire nor Procurement Lincolnshire had been contacted about the development brief or the proposed marketing approach. When Procurement Lincolnshire started to be engaged in August/September 2011 they did raise concerns about the approach taken, but were not able to give conclusive advice stating the Council did not provide them with sufficient details of the proposals.
42. The development brief was not advertised formally. It is not clear exactly how the development was made known to prospective developers, as the officers involved no longer work for the Council. It appears that the brief was made available through the Council's web site and at the Lincolnshire Show in 2011, and was sent to developers that had expressed an interest in developing in the town.
43. Prior to the start of the formal process at the end of July 2011 contact with developers was undertaken in no planned, or controlled way and proper records were not maintained. There appears to have been a lot of contact with Developer 3, both face-to-face and by email, including a visit with them to a Cinema's offices, while there has been no mention of contact with any other developer.
44. On initial submission officers considered the two proposals to be very different from a financial perspective with the Developer 2 proposal not considered financially viable at that stage and on this basis Developer 3 was preferred. From a non-financial perspective the documentation shows that officers had evaluated the proposals using the assessment sheets sent to the developers and identified developer 2 as best meeting the assessment criteria. The Council's retained agents also assessed the proposals, and whilst finding each development to be attractive, felt that neither solution was financially viable. Neither Legal Services Lincolnshire nor Procurement Lincolnshire were asked to comment on the proposals until January 2012 to inform the February Committee decision, and should have been involved in the process earlier.
45. Feedback was given to both developers – through clarity days - and they were asked to reconsider their proposals and resubmit them. Both developers made revisions to financial elements of their proposal and Developer 2 changed the anchor of their development from a cinema to a hotel. Officer's evaluation noted that although changes had been made to the financial model the final assessment from a financial viewpoint was that each development was very different. So although both submissions were considered financially viable they were not comparable. As a result the

decision to choose a 'winner' was based on the outcome of the quality (non-financial) evaluation.

46. In a document dated 2<sup>nd</sup> December 2011 - Trowers and Hamblins gave legal advice and they concluded:
  - ...in our view the contract is subject to the (EU procurement) regulations and the procedure which has been followed is not compliant with those regulations
  - ...challenge and enforcement are rare...the continuance with the deal is not always seen as a flagrant breach but rather a risk based approach to an area of law which is sometimes open to interpretation
  - If the council is sufficiently concerned at the risks (which if they were to crystallise would probably result in difficult consequences), then it has little option but to discontinue the current procedure and implement a compliant procedure...
47. Legal advice was also taken from Legal Services Lincolnshire. This recognised the risk of procurement breach but identified the potential for proceeding with the same process whilst structuring the deal as a land sale. Following this advice the Council worked closely with Legal Services Lincolnshire to ensure that the legal risks were minimised through the way the deal was structured and that advice was available when decisions were required by members.
48. As the way forward was structured as a land deal the Council's Contract Procedure Rules do not apply.
49. The Council therefore had two proposals that officers agreed would help with the regeneration of Gainsborough and eliminate the cost of maintaining the old Guildhall, but its options were limited by the way the process had been initiated. Officers considered that starting the process again might lose the developers and given the economic climate it might not be possible to attract the quality of submissions. Officers were also keen to progress so that moves could be made to demolish the Guildhall – a priority for the Council. Therefore on advice from Legal Services Lincolnshire the proposal could proceed as a land sale and to ensure that the language used did not give a misleading impression that a 'preferred bidder' in procurement terms was being appointed - the selection of a 'potential development partner' was used.
50. Officers made every effort to progress the development minimising risks as far as was possible but did not fully convey all the issues to all members of the Committees. Although the legal and procurement advice did underpin the Committee reports the limitation of the options available and the non-legal risks were not reported.
51. Developer 2 was appointed as the 'potential development partner' in February 2012 but there was confusion as to what this actually meant. The meaning of this was reiterated at the Committees, but the fact that there was some confusion amongst members led to a clarification email being sent to members on 20 March 2012. Confusion is also shown by the fact that in a letter to Developer 2 they were referred to as the 'potential preferred



development partner' and they referred to themselves in emails as the 'preferred developer' or 'preferred contractor'

52. However, it was not clear to many members of the Committee where the Council was in the process or the next stages of the development – some thought that proposals and options would be brought back to them. It should have been made clearer to them at the February Committees that so long as any issues could be overcome they would be voting for a land deal and a hotel on Whitton's Gardens.

### ***Conclusions***

53. The Council did not obtain legal and procurement advice at the start of the development but did so when assessing the proposals to be presented for key decisions in February and September 2012.
54. Obtaining specialist advice too late in the process could have had more serious ramifications – evidence shows that officers in the initial stages of the development substantially followed a 'procurement' process and could have caused compliance issues with both the Council's contract procedure rules and EU procurement regulations.
55. It is clear that the initial stages of the process did restrict the action the Council could take and stay within the law. The process changed and proceeding as a 'land deal' ensured that the Council did not act illegally or breach its Contract Procedure Rules.
56. The contact with developers in the initial stages of the project was not undertaken in a controlled way. Consequently there was a risk that all potential developers did not receive the same information. This improved once the invitations to submit formal proposals had been issued in July 2011.
57. Members of the Committees were not informed of the full extent of the legal advice received on the initial stages of the development or of all risks associated with the revised approach.
58. There was confusion in the use of the term 'potential development partner' which meant that it had to be clarified in an email to all members on 20 March 2012 after the decision had been made.
59. The initial marketing strategy was restricted and it was unlikely to offer the Council the best opportunity to attract potential developer interest. Procurement advice was not sought at this time and it should have been.

### ***Recommendations***

60. The Council obtains legal and procurement advice before commencing on commercial projects and at appropriate stages during projects.
61. The Council reminds staff of the requirements under its own Contract Procedure Rules and under EU regulations.

62. Before embarking on any exercise that might lead to procurement process the Council considers what it is seeking to achieve and the best method for securing its objectives. This might mean considering such techniques as “competitive dialogue”. In any event legal and procurement advice should be taken early in any process.
63. The Council develops a protocol for contact with prospective developers/contractors which manages the risks of such contact and include the dissemination of any information provided to one prospective developer/contractor to all prospective developers/contractors.

## **Project Management**

### ***Findings***

64. We found that there was no project management process applied in the period January 2011 to February 2012. After February 2012 a project management process was established that included Internal and External Project Boards, a Project Manager and Team and a Member Steering Group. A Project Initiation Document was produced which includes an initial risk register.
65. We identified that there were regular meetings of the Internal Project Group, and notes were taken of those meetings. There were several meetings of the Member Steering Group. A number of updates were also provided to the Commercial Board which provided the monitoring role for the project.
66. The records maintained during this period could have been more comprehensive. We have been told that the risk register has been updated but we have not been provided with an updated version.
67. The responsibilities of the member steering group were set out in the Project Initiation Document, these were:
  - Provide advice support and guidance to the project board
  - Act as key point of contact for members in respect of this project
  - Disseminate information to other members to ensure they are kept informed of the project progress
  - Contribute positively to the successful delivery of Elswitha Quarter
68. We were informed the responsibilities were tabled at the first steering group meeting. Whilst the list acts as a terms of reference a more formal terms of reference distributed to all members of the Committee would have been more helpful. One member of the group could not recall any terms of reference and considered the group to be no more than a forum for the exchange of information.
69. The work of the steering group was not reported back to Committee. Although this might not have been a role of the group it would have helped them fulfil their responsibilities of keeping other members informed of progress - some members we spoke to stated they expected the steering group to report back to Committees between February and September 2012

- following the selection of a potential development partner and to keep them informed of progress with the development.
70. The steering group was meant to feed information to the political groups so that there were no surprises when the final report came to the Committee, in this regard it was not successful, as few members other than the leading members of the ruling group knew what was happening.
71. Other than the ruling group the other political groups had little engagement with the project, especially with the steering group. Consequently information was not fed back through the groups - although opposition members had been nominated to serve on the Group. However the lack of clarity around the steering group, linked with poor lines of communication, and a thought amongst many that the steering group was to report back to the Committee, does partially explain this lack of engagement.
72. It was not helpful that some members invited to the group did not attend all meetings. Two members informed us that this was because they felt they were not listened to and that the group was only considering a single proposal. Others could not attend due to personal reasons. This lack of engagement by these members resulted in a lack of information sharing to other political groups.

### ***Conclusions***

73. The Council's project management approach was not applied during the initial stages of the development - this compounded the problems around process clarity, understanding and engagement. Although some of the expected controls were later introduced to improve the management of this project, some of the original issues continued to affect reporting and information sharing.
74. The responsibilities of the member steering group were not clear to all involved. The group failed to feed information to the political groups and did not report back to Committee. It was supposed to ensure there were no surprises when the report went to Committee; however for some it achieved exactly the opposite.
75. A list of the steering group's responsibilities was set out in the PID, however some members were not clear of the role of the group, or their role in the group, and when it did not meet their expectations they no longer participated in the group. Both members and officers could have made more of an effort to ensure the steering group worked effectively.

### ***Recommendations***

76. The Council's project management approach is always applied for projects that meet the project management criteria.
77. Groups that form part of the governance arrangements of a project have more formal terms of reference which includes individual responsibilities and reporting lines.

78. Where it becomes apparent that a steering group is not working effectively the project manager should address the reasons why and escalate the issue through the project governance structure.

## **Decision Making**

### ***Findings***

### ***Evaluation***

79. We have already explained the process and decisions to select a 'potential development partner' – this part of the report explores the evaluation process in more detail and the information contained in the reports presented to Committees as part of the decision making process.
80. Each development submission went through a process of evaluation which included, scoring the proposals by four officers against the quality criteria set out in the information sent out to developers, a financial evaluation on the submissions and two clarity days. Examination of the quality evaluation model identified:
- Some differences between the individual scoring sheets and the final summary sheet. This had an impact on the overall scores but did not change the overall 'winning' developer proposal.
  - Some minor arithmetical errors in both the individual scoring sheets and the final summary scoring sheet. These errors were identified by officers just before the Committee meetings on the 23<sup>rd</sup> February 2012. However, officers did not draw this to Members attention as they deemed the errors to be minor in nature and did not change the overall result of the 'winning' proposal. The consequence of this is that the decision to choose Developer 2 was based on inaccurate information.
  - The Council informed the developers of the outcome of the evaluation. Some of these figures were incorrect due to the above.
  - Two of the officers undertaking the scoring did not attend the clarity days. It would have been good practice for them to do so to ensure consistency, understanding and maintain confidence in the process.
  - It is unclear how the clarity days affected the final scores – an 'undated' report pulled together the views of the scorers but does not seem to have had any impact on the overall final scores.
  - One person scored significantly lower than the other scorers. Whilst not a problem in itself - given the size of the variation – good practice (as confirmed by Procurement Lincolnshire) would have been for all scores to either be endorsed or subject to a process of moderation.
  - Developer 2 was scored higher than Developer 3.
81. Following the clarity days held in October and November 2011 - Developer 2 altered the focus of their proposal. The cinema was no longer the anchor,

the hotel was the anchor - it still included a hotel on Whitton Gardens, a cinema, a bowling alley and restaurants. As a result the Council assessed that that the financial risks for Developer 2 reduced.

82. It was at this time (January 2012) that oversight and management responsibly for the project changed and progress was reviewed - including obtaining legal and procurement advice.
83. From a financial viewpoint each development was very different. So although both submissions were considered financially viable they were not comparable and not scored. As a result the information presented to members to choose a 'winner' was based on the outcome of the quality (non-financial) evaluation.
84. Financial appraisals on the Developers were undertaken.
85. The legal and procurement advice indicated that the least risky way forward was to go for a land deal, which does not come under the EU procurement rules, and the erection of a hotel by Developer 2 on land they would buy from the Council, was a land deal. Procurement Lincolnshire had also advised that to proceed with Developer 3's proposal would require a full EU procurement process to be followed.
86. The draft report went to the Chairs Briefing where the final content of the report was agreed. The financial risks and rewards were also presented to Leader and Chairman Panel – presentation January / February 2012.

### ***February 2012***

87. A draft version of the report that was to go to the Prosperous Communities and Policy and Resource Committees on 23 February 2012 was produced, and it was a very different report to the final report. The report to Committee did not include:
  - The strengths and weaknesses of each proposal (risks). Only a climate related risk was recorded in the risk assessment section of the report. The risk of procurement challenge and those relating to compliance with Section 123 of the Local Government Act 1972 (which requires the Council to obtain the best consideration reasonably available when disposing of land) were detailed in legal implications. The report did not make all members of the Committee aware that options were limited by the way the process had been initiated. We consider this to be a significant omission.
  - Provide detailed information on the outcome of the financial evaluation, how the Council financial interests would be best secured or the outcome of the company financial appraisals undertaken. An overview of the financial implications was provided stating that "both proposals were financially viable, but offer very different risk and reward profiles". The details of these risks and rewards were not explicitly provided to the Committee. It is our view that they should have been to ensure a more robust and informed decision. The

financial implications part of the report stated that although the "exact financial implications of the schemes cannot be determined at this stage - it is assumed that these will not change materially from the proposals shown here.... When the position is known - a further report will be brought back as required". The Section 151 Officer told us that any significant issues with the proposals were discussed at the Committee meetings. Our examination of the minutes doesn't show discussions on financial issues/risks/rewards. We therefore cannot form a view on whether the Committee fully understood the issues / risks associated with the proposals. The next reporting to Committees took place in September 2012.

- all potential options available i.e. the option not to proceed. The recommendation focussed on choosing the 'winning' proposal based on the outcome of the quality evaluation.
88. Senior Management view is that although the reports were concise they contained sufficient information for members to make a decision – they felt that additional information could have detracted from the evaluation detail – which is what the decision was based on. This was a key decision in the development and in our view, this approach limited the scope for challenge and robust informed decision making by the Committees.
89. We were informed by some members of the Prosperous Communities and Policy and Resources Committees in February 2012 that most members did not understand that they were voting for Developer 2 to be appointed as the 'potential development partner'. Having spoken to a representative number of members - who were on one or both of the Committees - we have confirmed that most members understood what they were being asked to vote on but some did misunderstand what 'potential development partner' actually meant.
90. Officers did make efforts to ensure members understood that Developer 2 were only the 'potential development partner' and what that meant, including sending out an email (20<sup>th</sup> March 2012) after the Committee meetings. However it does seem that for some a focus on the demolition of the old Guildhall might have clouded the decision on selecting Developer 2, whilst others thought that once the Guildhall was demolished further proposals would be brought back to the Committee and an actual developer would then be chosen.
91. A general question put to us by both officers and some members was – 'Why did members not challenge the proposals more in February 2012? '.

Members were not presented with any firm proposals for the site. They were asked to make a decision on the demolition of the Guildhall, and appoint a 'potential development partner' only. Members were told that the intention was to firm up the proposal, with a possibility that the final proposal may differ. Several members commented that they felt that there was no firm proposal that they could challenge. They did not consider that the selection of Developer 2 was the final selection - so there was effectively little to

challenge. There was an expectation that members would be presented with a firm proposal at a later date, which could be challenged.

92. Several members have stated that officers were not forthcoming in answering questions at the meeting – the minutes of the meeting indicate that Officers summarised the main aspects of each submission. There is no evidence in the minutes or from our discussions with a representative number of members on the committees that officers failed to respond to questions. However the ambiguity over the use of the term 'potential development partner' may not have helped give clarity over the next stages of the development.
93. If there was any uncertainty amongst members it was a belief that a 'potential development partner' had been appointed only to enable the Guildhall to be demolished and that at some later date a decision would be made as to the 'preferred' development partner. They knew that to get permission from the Secretary of State to demolish the old Guildhall, members needed to approve a suitable scheme to redevelop the site.
94. It is a fact that at this meeting Members resolved that the Council work exclusively with Developer 2 – who was recommended based on the outcome of the quality evaluation undertaken by officers. Developer 2 provided the 'winning' proposal that best met the evaluation criteria ie highest scorer.

### **September 2012**

95. By September 2012 the proposal put forward by Developer 2 had been refined to the extent that development on the site could potentially be achieved which met the objectives of the development brief. The Committee was asked to agree to sell part of Whitton Gardens to the potential development partner for the development of a hotel.
96. The report to Committees included some background information (reminding member of their decision in February 2012), a summary of progress to date, an outline of the proposal and the financial analysis for the proposal. The legal implications outlined in the February 2012 report were re-iterated and an outline of the financial implications was given. The report noted that "Risk had been assessed as the project has developed" – the details of these risks were not explicitly provided to members. In order for members to be able to take well measured risk decisions they need to fully understand the risks and impact associated with a decision. The report, similarly to the February 2012 report, did not make it clear that process issues in the initial stages of the development did restrict the action the Council could take and stay within the law.
97. The draft report went to the Chairs Briefing where the final content of the report was shaped and agreed.
98. At the September 2012 Committee meetings, whilst those members who were involved in the steering groups (and so had been involved in the progression of the development between February and September 2012)

were happy with the reports and the decision - a number of members we spoke to expressed some surprise at:

- Developer 2 moving from the potential to actual development partner
- Building on Whitton Gardens, which many did not think was available for development

These members were not against the development, but were surprised by these outcomes - again illustrating a lack of understanding of what the resolution in February 2012 meant.

## **Conclusions**

99. The 'ruling' group has strongly supported the Elswitha Quarter Development and the leading members of the group have actively contributed to the discussions on the proposals, together with officers. Whilst this is positive we did at times sense an 'ends justify the means' support for the project and noted that political dynamics did have an impact on the decision making process. This – in our opinion – has contributed to some members feeling unable to challenge the proposal. Members also did not at any time during the Committees formally ask for a deferral of the decision due to lack of information – officers stated that they had this option.
100. It is our view that Committees should have been presented with more detailed information on the proposals in February 2012. This would have helped them to fully understand all the risks and support a robust informed decision. Whilst we do not believe officers intentionally misled the Committee, the omission of some key information represented a risk to the Council's decision making process.
101. Members rely on officers following proper processes and presenting accurate information when they are asked to make a decision. If a decision is based on inaccurate information or a flawed process then it could be open to challenge or limit options available to the Council to lawfully secure desired outcomes. As was the case with the Elswitha development.
102. Our review identified a significant variation in one person's scores when compared to the other three scorers. Whilst it is acknowledged that it is not a requirement to moderate all evaluation processes and is a matter of judgement in each individual case - given the size of the difference between the scores - it is our view that moderation in this case would have led to a more robust evaluation and increased confidence in the outcome. This view is shared by Procurement Lincolnshire.
103. Members were asked to make a decision without knowing the full financial risks and rewards associated with the evaluated proposals or the final proposal presented in September 2012. To take a well measured risk decision the Committee needs to understand the keys risks and impact associated with that decision.
104. Although most members have told us that they were clear about what they were voting for in the February 2012 the confusion caused by the use of the term 'potential development partner' seems to have contributed to a lack of



understanding and challenge by members. This is supported by the fact that in September 2012 some members remained unclear about where the Council was in the process or the path taken for moving from 'potential development partner' to actual development. This is despite officer clarification.

105. When the officers managing the project changed – given the history and issues identified with the development so far - we would have expected the outcome of the evaluation to have been checked for completeness and accuracy before reporting to Committees in February 2012. This was a reasonable expectation and a missed opportunity to seek assurances and identify potential problems before proceeding to a member decision.

### ***Recommendations***

106. When members are asked to approve one of several options they are provided with sufficient information to make an informed decision, this could be achieved, for example, through the availability of a suitable business case, detailing the objectives and outcomes, showing strategic fit, and providing an options appraisal and risk analysis.
107. The Council should ensure that the evaluation process is strengthened - with results validated for completeness and accuracy and where appropriate scores moderated or at least some exploration of any significant variations.
108. Members are always made aware of any significant risks, issues, impact and all options that are attached to the decisions they are being asked to make.
109. The Section 151 officer should ensure financial risks are fully explained in reports, including what due diligence has been undertaken on significant investment decisions and/ or procurement proposed by the Council.
110. When the Council adopts an approach outside the normal way of contracting or working with partners it should clearly document the rationale for the approach, how it will be applied and the expected outcomes. The risks should then be recorded and reported to members to enable them to ratify the approach and understand and / or approve the risks being accepted by the Council.
111. We advise member training on the principles of sound project management and robust due diligence expected on investment decisions and significant procurement. This is to enable more effective challenge at key stages of decision making, both formal and informal, associated with priority projects.

## **Whitton Gardens**

### ***Findings***

112. Legal Services Lincolnshire has reviewed the legal position of Whitton Gardens - which confirms that the Council does have the right to develop on them. We have confirmed that:

- The land is made up of a number of packets of land which came to the Council, (or its predecessor), piecemeal from different owners over a period of time.
  - The documentation shows that two, possibly three, small pieces of land have covenants, and the planned hotel breaks none of them.
  - This is contrary to the belief of some members who are of the view that there is a covenant covering the whole site.
  - The legal advice provided to the Council was that it was difficult to determine who currently has the benefit of the covenants, and whether or not they could be enforced.
  - There is an option to negotiate away the covenants however this might prevent covenant indemnity insurance being obtained, and so the legal advice to the Council is not to attempt to negotiate away the covenants.
113. The title details were sent to the interested developers in July 2011. The work undertaken by Legal Services Lincolnshire to review the covenants took place in August 2011, following a request from the interested developers who were asking for this information to firm up their proposals. We would have expected the presence and impact of covenants to have been ascertained by officers before the development brief was issued.
114. One of the issues raised to us was whether Whitton Gardens was always available for this development from the outset. Whilst those involved at the centre of the project (including the Developers) were satisfied that Whitton Gardens was always available, others believe that the wording in the development brief precludes Whitton's Gardens from being available for development.
115. The development brief makes two references to Whitton Gardens:
1. Potential redesign of the riverside gardens to connect the site visually with the River Trent.
  2. Protected open space linking the site to the riverside, can be used to enhance setting and views.
116. Several members we spoke to said that they were surprised when the development being recommended included Whitton Gardens when it came to the Committees in September 2012 - they had not considered them to be available for development. However, although the minutes of the meeting clearly showed their concerns there is no indication that members asked for more time to consider the recommendations or for the decision to be deferred.
117. During our interviews there were numerous references to an email sent by an officer to Developer 3 regarding the use of Whitton Gardens. That email sent in May 2011, before the proposals were submitted said, '*Certainly we will not be able to change Whitton Gardens in to a car park*'.
118. A number of members have taken this email to mean that Whitton Gardens was not to be used for development. The officer who sent the email, who no longer works for the Council, has stated that his email was an:

*'...initial reaction that the extent of proposed car parking on Whitton Gardens was too great and amounted to turning the gardens into a car park. It was not a general statement about what could be done on Whitton Gardens. The concern about the proposal in this form....was (that) the extent of the car parking was unacceptable given its extent and lack of car parking.....I was not asked to express any views as to what other building work or structure would be allowed on Whitton Gardens'.*

119. It is clear from the number of strongly held and inconsistent views on this issue (including the developer who took the matter to Judicial Review) that the precise role and availability for development of Whitton Gardens within the overall development could have been made clearer at a number of stages. However, the merits of a challenge to the Council on the ground that Whitton Gardens could not be used for the development of a building in the original brief was presented to the High Court as part of the Judicial Review and the email of May 2011 formed part of the evidence in that case. We accept the judge's conclusions on that point – the Judicial Review was rejected - see paragraph 25.
120. Officer's obtained a valuation of Whitton gardens from their agents, who are retained by the Council for such services. On three occasions they were asked to value the land, the final valuation showing an amount of £75-£110k. Officers also looked at the cost of other comparable sites and were satisfied they were not selling at a higher value.
121. Several members have expressed concern that other valuations were not obtained, and that the Council's retained agents are known to have business links with the Developer 2. We have confirmed that at this time the agents were contracted to the Council so it was not unreasonable for officers to use them. Officers were unaware of these links with developer 2.
122. There is no evidence the Councils Agent failed to provide a professional and objective service to the Council, independent of the service they provide to other clients. In fact they were asked to review the viability of the proposals submitted by both developers and were equally critical of both and very complimentary about the Developer 3's experience in undertaking such projects.
123. The Council also has to meet the requirements of section 123 of the Local Government Act 1972 to achieve the 'best price reasonably obtainable' when selling land. We found that Councils agent were the only agent used to provide valuations.
124. Legal Services Lincolnshire have expressed a view that whilst the selling of land to an individual party without having carried out any form of marketing exercise is lawful, reliance on expert valuations carries with it an evidential risk that the valuer's views may not be upheld if the sale is challenged. It has been suggested to us that if the valuation is robust the Council's position is not made any stronger by having more than one valuation but in our view and in the circumstances outlined above - it would have been prudent for the Council to have obtained at least one more valuation from another valuer.

## **Conclusions**

125. Whitton's Gardens is land that the Council can use for development. However the wording around Whitton's Gardens in the development brief was ambiguous and the process that was followed meant that some members did not realise that Whitton's Gardens was available for development until the September 2012 Committee meetings.
126. Although Members did raise concerns over the project and the use of Whitton Gardens they did not ask for more time or request the decision to be deferred to enable further information to be provided.
127. There is a risk that the sale of land to a single party - without testing the market - could be challenged unless the Council can demonstrate that it is receiving the best consideration reasonably obtainable. This was set out in the Committee reports of September 2012 and reflected the legal advice obtained. In this case - officers took the view that the price proposed was the market price and did not involve any element of undervalue.
128. Although the valuation from the Council's agent is considered to be robust in the circumstances of this development it would have been prudent for the Council to have obtained at least one more valuation from another valuer to demonstrate best consideration and minimise the risk of challenge.

## **Recommendations**

129. In future projects and developments the development brief clearly details restrictions on the use of Council assets.
130. Members are made aware of the options available to them if they feel that they need more information to support a decision.
131. When responding to a question, or providing additional information to a prospective developer/contractor, the Council provides the same information to all prospective developers/contractors.
132. The Council ensures that it has a robust valuation from more than one valuer for any land that it is seeking to dispose of in accordance with section 123 of the Local Government Act 1972 other than by way of market competition.

## **Member Engagement / Information Sharing**

### **Findings**

133. We found that there has been effective engagement with the leader and relevant Committee chairs, through the steering group, leaders' panel and briefings. However, those members' information requirements were possibly different to that of other members of the Committee to help them make an informed decision. They did not want to see the detail or receive a lot of information on options etc.

134. Whilst this is not necessarily a problem officers and members should have considered that other members might have more extensive information requirements. In particular the information needs of the opposition group and independents was not effectively considered. As stated the Steering Group failed to keep all members appropriately informed.
135. We found that the original draft reports for all of the key Committee meetings had considerably more information within them (including more detail of the proposals, strengths and weaknesses and options) and were considered at the chairs briefing meetings where the final report was shaped by both officers and members to focus on specific recommendations. We have already commented on the adequacy of the information presented to Committees.
136. We found that most members support the development of the Guildhall site and supported a hotel and further development. However the information given to members on the proposals meant that many were surprised at the September 2012 meeting that Developer 2 had become the actual preferred developer and development was to take place on the Whitton Gardens site. Although the few members involved in the steering group had been aware of this others had not. This has resulted in numerous requests for information by members and ultimately led to the request for the Extraordinary full Council meeting held on the 25<sup>th</sup> February 2013.
137. During the project, Officers became aware that some members were in contact with Developer 3, but were unaware of the extent or nature of the contact. Officers were concerned that confidential information could be passed on to Developer 3 when they had requested a Judicial Review. We found that this was a legitimate concern and as a consequence it resulted in reduced information sharing. This is explored more fully in the section of the report covering – Member contact with developers.

### ***Conclusions***

138. Member engagement was not effective as it could have been. Although the steering group attempted to ensure information was shared - the information requirements of all members were not fully considered and representatives on this steering group failed to effectively keep other members informed (see previous sections of this report).

### ***Recommendations***

139. The Council recognises the differing information needs of individual members and groups and takes this into account in Committee reports, briefings and information sharing.
140. The Council puts in place arrangements to ensure that sufficient relevant information is made available to members and communication channels that ensure all members receive the information.

## **Member Contact with Developers**

### ***Findings***

141. Our findings show that Members also engaged with developers during the process. Whilst this was not always at their instigation such engagement was not appropriate and also posed risks for the proper conduct of the selection of the potential development partner. We were informed that as many as 13 members contacted Developer 3 after the February 2012 Committee meetings when it was still possible that they might have further involvement in future stages of the development. We have not validated the reliability of this information, however, it does indicate a lack of understanding by members of their role and remit during significant procurement processes and the need to maintain commercial confidentiality.
142. We were told that during the period of the Judicial Review officers had concerns about member contact with Developer 3. We have confirmed this was the case. The Chief Executive sent a letter to all members setting out the Council's position and the need to protect the Council during the Judicial Review. Not all members appreciated the significance of this letter and appear to have continued to have contact with Developer 3. Again, whilst this contact was not always at their instigation it was inappropriate to engage with Developer 3 about Elswitha during the Judicial Review. This was also why the Extraordinary Council, requested in November, could not be held until February 2013.
143. Some of the members who had contact with Developer 3 raised concerns about the process through their political groups. The members involved felt that their concerns were not fully investigated. Officers and senior members did take their concerns seriously, but could not give detailed answers to members information requests due to litigation risks and the potential for information to be shared with the litigant.

### ***Conclusions***

144. It is a fact that members had contact with developers once the process had commenced and during the Judicial Review – this contact was not always controlled or appropriate. Whilst we recognise that contact with developers is necessary to help form ideas it should always be controlled and formalised, with appropriate records kept.
145. It is also our opinion that the uncertainty around the process and issues identified around sufficiency of information and communication also contributed to the level of member contact with Developer 3.
146. Officers had legitimate concerns about member contact with Developer 3 during the Judicial Review process and in this instance took appropriate action to protect the interests of the Council.
147. Members did not fully consider their role as a Councillor to protect the interests of the Council, when they were making contact with a litigant when there was a threat of a Judicial Review.

### ***Recommendations***

148. The Council reminds members that once a procurement, tendering, or contracting process has commenced all contact with the potential developers / partners must be undertaken in a controlled way and recorded.
149. When potential developers instigate inappropriate contact it is reported immediately to the Monitoring Officer and the contractor informed to cease such contact.
150. The Monitoring Officer is more proactive in ensuring that appropriate member and officer standards and behaviours are maintained.

## **Stakeholder Engagement**

### ***Findings***

151. We found that there has been no engagement with the public and no formal engagement with stakeholders since the initial workshop that led to the development brief in September 2010.
152. It was explained that the public consultation was planned if negotiations were successful with the hotel provider, with engagement taking place before any planning application was submitted.
153. Some members felt that consultation and public engagement could have been clearer and potentially undertaken in the early stages of the development.

### ***Conclusions***

154. Given the nature of this development it is difficult to conclude on the adequacy of stakeholder engagement – the project was still being evaluated and proposals explored. However, given the sensitivities and potential impact of the development the Council should have given more consideration to stakeholder consultation and agreed how and when this should take place throughout the life of the development.

### ***Recommendations***

155. The Council undertakes an impact analysis on its key investment decisions assessing who might be affected by the decision and how they might be affected. The outcome of this analysis could then help shape any communication and engagement strategy.
156. In future developments the Council ensures that it engages with stakeholders at an early date and identifies key stages for engagement opportunities throughout the life of a project, especially where major changes occur.
157. Stakeholder engagement should be identified as a key element of project plans.

## **General Governance Issues**

158. During the course of the interviews undertaken as part of this review comments were made in respect of governance issues not specifically related to the Elswitha Quarter development. We have made details of those issues available to the Council for consideration in the Governance Review that is currently taking place. This is assessing the Council against the 6 principles of the CIPFA/SOLACE publication 'Delivering Good Governance in Local Government'.

## **Good Practice**

159. During the audit we identified the following good practice during the review:
- The clarity days enabled the officers to understand the proposals and question the developers.
  - Following the clarity days the developers had the opportunity to revise their proposals in the light of comments made by officers.
  - The Council robustly defended the threat of Judicial Review.
  - The Council was aware of the commercial confidentiality of the information it held and took all reasonable action to protect it.
  - The draft Commercial Strategy is a good document which sets out how the Council intends to meet its aspirations of an entrepreneurial Council and strengthen compliance and the governance and control framework.
  - The fact that an independent Internal Audit was commissioned - to provide assurances to members following an Extraordinary Council meeting – is an example of good governance principle of openness and transparency and demonstrates a willingness to learn.