

Key Decision Required:	No	In the Forward Plan:	No
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CABINET

27 FEBRUARY 2015

REPORT OF THE REGENERATION, INWARD INVESTMENT AND ASSETS PORTFOLIO HOLDER

A.4 LAND SOUTH EAST OF MARINE PARADE EAST – EXCLUSIVITY CLAUSE (Report prepared by June Clare)

PART 1 – KEY INFORMATION

PURPOSE OF THE REPORT

To approve the inclusion of an exclusivity clause within the terms for the supplemental lease of land to the South East of Marine Parade East upon which the lessee proposes to build a water park facility.

EXECUTIVE SUMMARY

The Cabinet agreed, in principle, to the granting of a supplemental lease on land to the South East of Marine Parade East on 13 December 2013 (Min 111 refers) and the Heads of Terms and delegations were subsequently approved at Cabinet on 21 March 2014 (Min 166 refers). During the negotiations on the draft supplemental lease, the proposed lessee, Clacton Pavilion PLC (CP plc), approached the Council for an exclusivity clause to be included as a term in order to provide some commercial certainty and to protect the value of their investment.

The exclusivity clause will prevent the Council for a period of five years, from allowing any land or buildings in the Council's ownership, within a specified area shown in Appendix 1, to be used as a water park.

The remaining terms of the lease are still subject to agreement and continue to be protected by confidentiality until such time as the lease is completed; however it is considered that the inclusion of an exclusivity clause affected the wider public interest.

RECOMMENDATION

That Cabinet approves the inclusion of an exclusivity clause in the supplemental lease on the terms as set out in this report.

PART 2 – IMPLICATIONS OF THE DECISION

DELIVERING PRIORITIES

The delivery of this project would contribute to a range of Council priorities including:

- Build a thriving tourism industry
- Promote sustainable economic growth
- Regenerate the district and improve deprived areas
- Protect and enhance our environment, countryside and coast

In particular, this request is timely when aligned with the construction of the new 5km of beaches and the completion of the Seafront Feasibility study and its emerging conclusions.

FINANCE, OTHER RESOURCES AND RISK

Finance and other resources

The exclusivity clause could reduce the Council's opportunity to generate income from a waterpark on other Council-owned sites in the defined area. However, the impact is likely to be minimal and can be balanced against the loss of revenue income from the Pavilion site should the existing proposal for a water park not be delivered due to the level of commercial risk. In economic terms, there is less risk and greater benefits to the economy in having additional rather than duplicate facilities so having one water park would be a positive move. The Council owns few areas that would be affected by a potential exclusivity clause and it should be noted that the clause would only apply to fresh water, not sea water activities.

Risk

If an agreement is found to infringe competition law, the party benefiting from the prohibited agreement may face enforcement action by the Office of Fair Trading (OFT) and could affect Clacton Pavilion plc. Parties to a prohibited agreement may also be susceptible to a private action before the courts for damages or injunctive relief for breaches of competition law. The risk is considered minimal due to the assessment of the OFT Guidance and justification provided by Clacton Pavilion plc and the Council being satisfied the exemptions provided within the Guidance can be relied on.

LEGAL

The request for an exclusivity clause to be inserted within a lease is covered by pre-existing guidance issued by the Office of Fair Trading Guidance (OFT 1280a) in March 2011 concerning the Application of Competition Law following the Revocation of the Land Agreements Exclusion Order 2010.

- Anti-competitive behaviour, which may affect trade within the UK, is specifically prohibited by Chapters I and II of the Competition Act 1998 and the Enterprise Act 2002. Any agreement which falls within this scope will be void and unenforceable, unless it benefits from an exemption. When considering whether a land agreement is prohibited, it is therefore necessary to assess: whether the agreement prevents, restricts or distorts competition and if it does,
- whether it benefits from exemption.

In order to qualify for exemption, four cumulative criteria must be satisfied, these are as follows:

- The agreement must contribute to improving production or distribution, or to promoting technical or economic progress (also known as the efficiency gains or benefits of the agreement).
- It must allow consumers a fair share of the resulting benefits.
- It must not impose restrictions beyond those indispensable to achieving those objectives.
- It must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question.

To assess the proposed exclusivity clause against the exemption criteria, Clacton Pavilion plc, were requested to provide reasoned justification to rely on the same, in line with the OFT Guidance. It is considered that the benefits of providing a water park on the Clacton seafront would contribute to improving the social, economic and environmental well-being of the area; improve the viability of the leisure sector in Clacton and increase the footfall to the town to the benefit of all traders. In addition, the exclusivity clause would only cover the provision of a water park (using fresh water) on Council-owned land within a specified area and has been limited in duration to five years.

Therefore, upon being satisfied that the exemptions apply, it is appropriate for the Council to provide an exclusivity clause in relation to the operation of a water park on the Council's land in a clearly defined area.

OTHER IMPLICATIONS

Consideration has been given to the implications of the proposed decision in respect of the following and any significant issues are set out below.

Crime and Disorder / Equality and Diversity / Health Inequalities / Area or Ward affected / Consultation/Public Engagement.

None

Ward
Pier

PART 3 – SUPPORTING INFORMATION

BACKGROUND

In August 2014, Clacton Pavilion plc (CP plc) became extremely concerned when it was approached by a third party who suggested that they had been granted permission by the Council to provide a 'splash and play' area at Martello Bay. Whilst the facility did not materialise, concerns were raised by CP plc regarding its major investment in a water park facility being planned at its existing site, and the stipulation by the Council within the draft lease regarding timescale and period of operation. It is accepted that this provision has been negotiated but this recent event has served to highlight potential commercial implications.

In addition, the recent bad weather has highlighted the fragile nature of the leisure sector in seaside resorts and this creates financial uncertainties when planning investments. Any actions that can be taken to mitigate these unpredictable conditions and reduce financial risk can only help to underpin project viability.

CP plc are therefore seeking to agree with the Council an additional clause in the draft supplemental lease whereby the Council agrees not to allow or grant consent for any other water parks (using fresh water) on its own land within an agreed distance of Clacton Pavilion – the area is shown edged "X" and defined within Appendix 1. It is proposed that any such clause will be linked directly to the definition of a water park and the timeline proposed in the draft lease for the water park to be provided and maintained in operation. The clauses would then be jointly discharged. The remaining terms of the lease are still subject to agreement and continue to be protected by confidentiality (by virtue of Paragraph 3 of Schedule 12A of the Local government Act 1972) until such time as the lease is completed; however it is considered that the inclusion of an exclusivity clause affected the wider public interest.

Clacton Seafront

A number of existing Council documents, the Local Plan and 'Celebrate on Sea' as examples, have long recognised the issues faced by coastal towns and the challenges that have to be overcome to regenerate the economy. Indeed, the commonality and range of problems suffered by seaside resorts and towns are being worked upon by the Coastal Communities Group within the SELEP, a cross LEP group, which is chaired by the Leader of this Council.

These common issues have also been the subject of various studies by Professor Steve Fothergill at Sheffield Hallam University who has written a number of papers on the topic, including ones in 2003 and 2012, which look at the issues facing England's Coastal Towns and provide benchmarking data.

The Council has also undertaken research into the commercial interest in the current Clacton seafront area. Direct contact has been established with a wide range of tourism and leisure operators mainly in the hotel and catering sector, and adventure sector to assess their 'appetite' for gaining a presence in or near Clacton and to test their perceptions of Clacton as an investment location.

Operators' perceptions of Clacton are not very positive in the current economic climate. Clacton is not viewed as a primary target location for accommodation providers and hoteliers, both budget and mid-range chain. However, Clacton has recently been successful in attracting the Premier Inn chain following a long period of lobbying the company (since 1999) to invest in a new facility in the town.

Operators are also less willing to take a position within relatively stand-alone and isolated locations with seasonal fluctuations in terms of footfall, which makes it difficult to develop a viable business. The overall summary is that Clacton is a 'hard sell' to appeal to both operators and developers who are active in the leisure marketplace.

The main investment interest in Clacton largely emanates from local entrepreneurs with an existing presence in the town and their confidence to reinvest and enhance their product - notably the Pier and the Pavilion. These parties have shown a strong commitment to ongoing investment over the long-term and it is considered that these investors deserve recognition in this respect in the face of sometimes negative media and more general, headline economic woes.

Whilst these headlines do not make good reading for the District, they do reflect the situation in similar seaside towns to Clacton where issues of transport and access; deprivation; higher than average unemployment; seasonal employment; lower than average educational attainment and peripherality apply.

The Council's current project to protect 5km of the Clacton to Holland Haven coastline does have the potential to act as a catalyst for the renaissance of Clacton and working with existing investors is seen as an important key step in kick starting the revival of the area.

CURRENT POSITION

The Pier and The Pavilion have long been seen as the active hub of tourism activity for Clacton, leading to a quieter area to the east of the Pier and a more family and visitor focussed area to the west of the Pier leading all the way along to Martello Bay.

The Pavilion itself has already completed two main phases of development enhancing its facilities with an upgraded family restaurant, a bowling area and an area for family entertainment. The proposal to deliver a water park has remained confidential until now and provides the opportunity to offer a brand new, unique facility for Clacton, thus contributing to the joint aims of increasing both footfall and spend in the local economy.

Discussions around an exclusivity clause have been ongoing and CP plc are willing to accept a shorter duration (five years) and a more tightly defined geographical area (approximately one mile) for the clause than they originally asked for – see Appendix 1 for detailed plan.

Pre-application planning discussions have already taken place on the development of the Pavilion site with Planning Officers and CP plc are keen to deliver the project – something that will complement the Council's work on the beaches.

If Members are minded to support the exclusivity clause, it would be possible for the new waterpark facility to come on stream, early in the life of the new beaches which are expected to be completed at the end of 2015.

BACKGROUND PAPERS FOR THE DECISION

Celebrate on Sea

APPENDICES

Appendix 1 – Location Plan – area of proposed exclusivity clause – to apply to Tendring District Council land only.

**TENDRING DISTRICT
COUNCIL**

M. KNAPPETT
BA(hons). DMS. MCIH.
HEAD OF CORPORATE
PERFORMANCE

Title

Clacton Pavilion,
Marine Parade East
Clacton on Sea

Option 2

The distance between The Pavilion and the Toby Carvery boundary replicated on the east side of the pavilion and inland to the road edge which is the boundary of Tendring District Council owned land.

Revision B extended to include Martello Bay on the western boundary and extended inland to include Martello Tower F

Date: 8 December 2014

Scale: 1:6000

Drawn By: J. Weavers

Drawing No. & Revision

2

B

