

This report will be made public
on 5 April 2006

Folkestone

Hythe & Romney Marsh
Shepway District Council



Report Number **C/05/132**

To: Cabinet
Date: 5 April 2006
Status: Non-Key Decision
Responsible Officer: Alistair Stewart, Chief Executive

Subject: SHEPWAY LEISURE PFI

SUMMARY:

On 21 February 2006, the Council and Folkestone Sports Centre Trustees (FSCT) jointly presented a revised scheme to the Department for Culture, Media and Sport (DCMS). The DCMS supports the approach now being taken as the only way to achieve the required outcome and provide value for money. In order to progress the Project to financial close (no later than March 2008) a revised outline business case is to be prepared by the end of May 2006. Following an emergency meeting of the PFI Steering Group on 31 March, this report seeks approval for expenditure in the short term, up to the end of May 2006 in order to achieve this target.

REASONS FOR RECOMMENDATIONS:

Cabinet is asked to agree the recommendations set out below:

- a) The partnership with FSCT needs to be tested to establish whether or not it makes the project viable. In order to assess the viability of the partnership FSCT needs to establish the value of the land it is willing to sell and undertake legal advice to establish to what extent it is able to buy into the project.
- b) To enable the Project to progress in accordance with the revised programme submitted and approved by the DCMS.

RECOMMENDATIONS:

1. To receive and note the Report C/05/132.
2. On the proviso that FSCT agrees:
 - (i) the facility mix of the proposed new sports centre at Cheriton Road; and
 - (ii) agrees the Heads of Terms on the basis of purchasing the freehold of the Cheriton Road site and leasing it back to the Council for the period of the PFI contract thereby enabling it to become a full partner in the project then on the above basis Members are asked to authorise revenue expenditure in the

sum of £35,000 being the monies due to enable the FSCT to undertake valuation and legal advice upon its ability as a Trust to enter into a PFI scheme and to enable the revised business case to be prepared ready for submission to the DCMS by end May 2006.

3. To authorise revenue expenditure in the sum of £28,072 (refer to Table 1 below) being the monies spent utilising the Chief Executive's emergency powers in the delivery of the revised business case demanded by the DCMS, which was submitted in January 2006 plus barristers' fees on the feasibility of the Trust entering into a PFI contract.
4. To note the estimated additional revenue fees set out in Table 2 below projected to financial close of the PFI. A further report on potential capital contribution, affordability and fee position will be brought to Cabinet on 3 May 2006.

1. INTRODUCTION

1.1 The Council submitted a revised business case to the DCMS early in January 2006, which demonstrated that the Project was not affordable with two centres operating in competition in Folkestone. Against this background it became very clear that in order to preserve the PFI credits for the people of Shepway, the Council would have to work in partnership with the FSCT in order to deliver a viable alternative, or the Trust would need to close its centre permanently once the new centre was open.

1.2 The alternative proposal is as follows:

The FSCT invests a sum of money raised from the sale of the land currently occupied by the FSC into the freehold of the new site. The two areas containing the new facility and the existing site would merge as one single scheme. The outdoor facilities form part of the new project, the land would be sold with planning permission and the FSC would remain open until the new facility becomes operational. The enhanced scheme would include facilities currently provided by the FSCT.

1.3 The alternative was jointly presented to the DCMS on 21 February 2006 and its representative subsequently wrote to the Council stating that the DCMS supported the new approach as the only way in which to achieve the required outcome and remain in PFI terms, value for money.

The following three points were key to the DCMS agreement:

- (i) Agreement and confirmation on the facilities mix prior to commencing work on a new business case;
- (ii) A legal agreement between the Council and FSCT;
- (iii) Adherence to the project timetable.

2. CURRENT POSITION

2.1 Shortly after the Michael Howard meeting held on 13 January 2006, the Council instructed Counsel to give advice on the position of the FSCT and those matters to which it needed to give early consideration to enable it to assess its position to go forward with the PFI contract. The FSCT had input to and the benefit of this legal advice and in the spirit of the partnership the Council has paid £7,500 for this work so that the FSCT could progress quickly with the issues and decisions necessary to comply with the DCMS timetable. The FSCT met on the 14 February 2006 and again on the 16 March 2006. To-date no formal response has been received from the Trust save a copy of the resolution from the February meeting (a copy is appended) and the letter from Alec Perry in response to the Chief Executive's letter mentioned below.

- 2.2 Following the presentation on 21 February, the Project Team has met on three occasions. Information has been requested from the FSCT in order to comply with the three key DCMS requirements to progress the Project and feed into the outline business case. Despite assurances this information was not forthcoming, which lead the Project Team to question the on going commitment of the FSCT as a true partner. The Chief Executive wrote to the FSCT on 24 March expressing his disappointment that no information had been received and stated that the Council's officers had been requested not to commit further time or money to the Project. A copy of this letter is appended to the report along with a response from the Chairman of the FSCT.
- 2.3 The evident lack of openness and commitment which are all essential elements of a robust partnership, coupled with the content of the letter from the Chairman of FSCT, lead to the calling of an emergency meeting of the PFI Steering Group on 31 March.
- 2.4 At the meeting on the 31 March, officers were handed a copy of the revised Heads of Terms drafted on behalf of the Trust, however, it is understood that Mr. Perry is still reviewing the minutes of the meeting of the 16 March, the revised Heads of Terms and response to the Council, which have yet to be formally received.

3. EMERGENCY MEETING OF THE PFI STEERING GROUP HELD ON 31 MARCH 2006

The following persons attended the meeting: Andy Jarrett, Jo Gabell and Colin Paine (Officers), Cllrs. Carole Waters (Chair), Lynne Beaumont, David Monk, Neil Matthews, Wendy Harris and John Schoner, Tessa Stickler (Manager of FSC) and Lyn Smith (Trustee).

At this meeting the following issues were discussed:

- Response of the FSCT chairman - the fact that the only correspondence received from the Trust was a personal response by Alec Perry to the Chief Executive's letter. The response was written on FSC headed paper and signed as Chairman of FSCT.
- Failure of the Trust to respond – see 2 above.
- Failure to appoint the Trust's legal advisers to enable delivery of the project- the Trust did not resolve to appoint its own legal advisers and the reason for this was that the Trust are concerned that its monies would be abortively spent if the project was not delivered.
- Fees - it was suggested by the Trustee that if the Council was prepared to pay the legal and valuation fees of the Trust to enable it to determine whether or not it was able to be a partner in the PFI project, the Trust would be in a position to retain legal and valuation advice quite quickly.

- Charity Commission - Alec Perry has written to the Charity Commission enclosing copies of the Barristers advice received by the Council asking for its advice on the proposed PFI. There was no evidence that this letter was written with the authority of the FSC.
- Support for the Project - it was indicated that despite the agreement with the Council, not all members of the Trust are fully supportive of the Project.
- Attendance at Steering Group meetings, despite the Trust having the ability to have 4 representatives present, attendance has been limited to one Trustee despite offers to hold meetings at times more suitable to those Trustees that are unavailable during the day.
- Frequency of Trust meetings - a request that the Trust organises themselves to meet on a weekly basis has not been forthcoming.
- Control of the retained land - originally the Trust determined that it would put the running of the retained ski slope etc. into the PFI mix. It now appears the Trust may wish to run these facilities themselves.
- Communication - as seen above the Trust has not communicated any decisions or problems to the Council. However, since the Friday meeting the Sports Centre Manager has contacted the Council to notify the team that a meeting has been called for the 7 April 2006. The items on the agenda are:
 1. Report on Steering Group meeting held on 31 March 2006;
 2. To approve the amended Heads of Terms;
 3. To appoint a valuer to undertake valuation of Trust land in accordance with s.36 of the Charities Act;
 4. To appoint solicitors to act on behalf of the board of Trustees;
 5. That points 3 and 4 are subject to the Council underwriting the costs.
- Heads of Terms - a draft copy of the amended Heads of Terms was handed to officers by the Trustee present, the content of which is discussed below.

As a result of this meeting the Council needs to consider its position very carefully as the associated costs of this project are of great concern particularly if the project were to fail.

4. HEADS OF TERMS (HOT)

The revised draft Heads of Terms

- 4.1 The Council drafted Heads of Terms and sent them to the Trust for consideration on the 17 February 2006. These incorporated those matters contained in the Trust resolution of 14 February 2006. Although no formal response has been received from the Trust, a comparison between the two documents was made on the basis of the draft revised Heads of Terms handed to the Council on 31 March 2006:-
- 4.2 The HoT drafted by the Council were based on the Trust resolution of its meeting on 14 February 2006. The amended draft has replaced this with a resolution of its meeting on 16 March 2006. The Council does not have a copy of resolutions of 16 March, it is understood however that the February meeting of the Trust was not constituted in accordance with its Memorandum and Articles of Association, therefore the February resolution is assumed to be invalid.
- 4.3 The main differences to the HoT are:
- (a) SDC HoT –The Trust to sell the land comprising the whole of the Trust site with the exception of the skate board park; ski centre; golf course; outside football/tennis; an access-way and sufficient land to provide an après ski/reception building.
- Trust HoT - subject to negotiation to sell part of their land holdings. All the above exceptions remain plus such land as is required to provide a car park for the facilities at 2 (A-D) (no explanation as to what this means is available); it also refers to plan 1a which identifies the agreed land to be sold, please see attached plan which is from one of the development briefs supplied by the Council.
- (b) SDC HoT - the land to be disposed of by the Trust to be sold with the benefit of planning permission, which is to be obtained by the Council
- Trust HoT - that the land as described in resolution 2 (we do not have a copy of this resolution but assume it is plan 1a) shall be the subject of a planning application by SDC. The board asks that SDC use its best endeavours to not applying the social housing and education provisions to the site.
- (c) SDC HoT - that the Trust will invest a sum of money raised from the sale of its land into the freehold of the new site, such sum to be determined once a valuation has been obtained. The Trust understands that the District Council is seeking a capital investment in the region of £3m in order for the Trust to become a full partner in the scheme.

Trust HoT- the Trust will invest a sum of money raised from the sale of the land, as detailed in resolution 2, into the freehold of the new site. Such sum to be determined when a valuation of the site has been obtained and will be sufficient to cover the enhancement at the Cheriton site.

- (d) SDC HoT – within 28 days of the DCMS confirming that the business case is viable and confirmation by the Trust that it is legally able to deliver the PFI project to complete a legally binding agreement between the Trust and SDC for delivery of the PFI scheme.

Trust HoT – have added the words “and the Trust confirming the project is approved by the Charities Commission”

The main difference to the Heads of Terms is that the Trust has taken out reference to the £3m investment.

5. FEES

- 5.1 The table below shows the anticipated expenditure on fees up to and including the submission of a new business case at the end of May 2006. These fees should enable the Trust to determine whether or not it is able to progress with the PFI or not.

Work to be done	Cost (£)
Design workshop and capital cost review	5,500*
Affordability and financial modelling	17,000*
Land valuation	2,500 (est.)
Legal fees of the Trust	10,000* (est.)
Total	£35,000

* Fees to be capped

Members should bear in mind that, in addition to the above, a further £20,572 has been spent on PMP fees and £7,500 on barristers' fees in order to progress the project to this point. These fees are outside the capped fee arrangement, which was approved by Cabinet in September 2005. These additional fees have been authorised by the Chief Executive under his delegated powers to act in the event of urgent business. A copy of the fees are shown in the appendix

Additional fees over and above those currently approved and those outlined in this report will be required an estimate of these costs are also appended to this report.

6. PROGRAMME

A detailed, short-term programme is appended to the report. This shows that the preparation and delivery of a business case is still achievable within the timeframe agreed with the DCMS providing;

1. the Trustees agree to meet on a regular and frequent basis
2. that decisions are communicated between partners without delay
3. that there are no enforced changes to the project which will impact upon the final business case.

7. RISK MANAGEMENT ISSUES

Risk	Seriousness	Likelihood	Preventative Action
FSCT land value insufficient	High	High	Early valuation followed by negotiation with FSCT
Increase in construction costs	High	High	Realistic capital costing by design architect and project inflation costs
Charities Commission do not agree with proposals	High	Medium	FSCT taking early legal advice and being prepared to deliver the project
FSCT continue to delay	High	Medium	Regular meetings of the Trustees and compliance with programme
Business case not viable	High	High	Flexibility of partners
Failure to deliver business case to DCMS	High	Medium	Compliance with programme
Non approval of additional costs	High		Cabinet approval of fee expenditure contained in this report

8. FINANCIAL OFFICER'S COMMENTS

Fees

The approved budget allows £635,000 for procurement process professional fees. To date approximately £553,000 has been incurred leaving an available balance of £82,000.

The table below sets out the latest position:

	£
Paid to date:	
PMP Consultancy	311,000
Legal Fees	85,000
Environmental Impact Assessment & Habitat Survey	128,000
Ground Investigations	14,000
Media Strategy	3,000
Other Costs	12,000
Total paid to date	553,000
Additional fees outlined in Appendix 3	128,750
Fees in relation to Folkestone Sports Centre Trust and May 2006 business case (recommendation 2)	35,000
Fees still to be incurred through capped agreement to financial close	188,450
Total estimated fees to financial close	905,200

The Council has entered into capped fee arrangements with PMP Consultancy and Bevan Brittan for the provision of specialist PFI and legal advice. These capped sums are £124,000 and £138,000 respectively.

On the assumption that the capped amounts remain unchanged and the project continues to financial close, total fees are estimated to be £905,000, £270,000 over the approved budget.

Professional fees incurred must be charged to revenue in accordance with FRS 5 reporting the substance of transactions and CIPFA guidance. Allowance has been made to meet professional fees within the scheme's approved budget from earmarked revenue reserves. Consequently if the scheme progresses any overspend would have to be met from revenue resources. At this stage the Council does have a remaining budget of £82,000 which can accommodate the £35,000 requested to be released in respect of supporting the Folkestone Sports Centre Trust towards the May 2006 business case (recommendation 2). A further report will be brought to Cabinet outlining the anticipated fee position to financial close, no later than July. A profile of the anticipated fees to financial close will be included in this report. Cabinet will then need to consider how the expected

overspend (£270,000) can be contained within the existing approved budget, should the scheme progress.

Capital Contributions

Section 4 of this report considers the Heads of Terms being entered into with Folkestone Sports Centre Trust. The Trust has removed the reference to making a capital contribution in the region of £3 million. A change to the level of capital contributions will affect to level of the ongoing unitary payments by the Council to the operator.

This change causes concern regarding the affordability and hence viability of this scheme. Once further information is available an assessment must be brought to Cabinet setting out in full the financial implications. Cabinet must then assess whether the scheme should progress in light of its impact on the Council's overall financial position.

9. **CONCLUSION**

The Cabinet is asked to note that whilst the report recommends the release of monies to enable the FSCT to undertake the work necessary to determine the viability of the Project, it has to be acknowledged that since the FSCT agreed to the principle of a partnership back in February 2006, to date no written evidence of its willingness to work with the Council has been forthcoming. On this basis Members are asked to consider at this stage whether or not they wish to continue to commit more money to this scheme.

Members could take the view that committing more resources to this scheme would not deliver anything further. However, the attached timetable could still produce the original outcome with effort from both sides. To demonstrate our desire to achieve, we could make one last attempt by committing the resources identified.

10. **CONTACT OFFICERS AND BACKGROUND DOCUMENTS**

Councillors with any questions arising out of this report should contact the following officer prior to the meeting:

Jo Gabell, Solicitor to the Council
Tel 01303 853248 e-mail jo.gabell@shepway.gov.uk

Colin Paine, Project Manager
Tel: 01303 853379 email: colin.paine@shepway.gov.uk

The following background documents have been relied upon in the preparation of this report:

[Appendices](#)

Table 1

COSTS INCURRED OUTSIDE CAPPED FEES AGREED BY CABINET ON 7TH SEPTEMBER 2005

Month	Fees	Work carried out	Agreed by:
Aug. 05	£1,463	Research into existing pricing policy. Preparation for and attendance at Pricing Workshop on 31 st August. The Pricing Policy Paper was presented to Cabinet on 12 th October	Steering Group on 16 th August. Refer to S1.1 of Cabinet Report C/05/60.
Sept. 05	£881	Preparation of Pricing Policy Paper	The Pricing Policy Paper was presented to Cabinet on 12 th October.
Oct. 05	£1,284	Preparation for and delivery of payment mechanism and benchmarking workshop at Corporate Management Team on 12 th October.	Steering Group on 3 rd October.
Oct. 05 Cont.	£1,535	Commenced work on unitary charge modelling and updating business plans.	Corporate Management Team on 12 th October.
Nov. 05	£9,781	Business planning, unitary charge modelling (3 year scenario). Presentation of report on 22 nd November to members and officers. Further affordability report on full term scenario (30 years)	Corporate Management Team on 12 th October. Meeting on 22 nd November.
Dec. 05	£2,235	Affordability report on 10 year scenario, assistance with revised business case and advice on sustainability of Folkestone Sports Centre.	Meeting on 22 nd November.
Jan. 06	£3,393	Preparation for and attendance at the meeting with FSC Trustees on 17 th January 2006. Preparation of an aid to negotiation regarding the new facilities mix.	
Feb. 06	£7,500	Barristers fees on advice of Trust to enter into a PFI	
Total	£28,072		

Table 2

ESTIMATED PROJECTED FEE SITUATION

Task	Bevan Brittan	Other
PFI training session	£2,500	-
Land sale – FSC Trust	-	£30,000
Land sale – Hythe Pool	-	£40,000
External financial advice	-	£10,000
Legal agreement with FSC Trust	£3,000	-
Delivery of marketing strategy	-	£10,000
Extension of EIA at Folkestone	-	£20,000
Town Green Application	-	£10,000
Parish Poll	-	£3,250*
Total	£5,500	£123,250

*This is 50% of the estimated cost of the Parish Poll

LK/Mr A Stewart/cp
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24 March 2006

Mr A Perry
1 Little Thorpe
Dixwell Road
Folkestone
Kent CT20 2JB

Dear Alec

Shepway Leisure PFI

I understand that the Trust formally met on Thursday 16th March 2006 with a view to putting in place decisions to enable the Partnership to progress towards preparing a revised business case for the Department for Culture, Media and Sport (DCMS) by the end of May 2006.

Prior to the meeting on the 16th March, representatives of the Trust met with officers of the Council's Project Team on 7th and 14th March. At these meetings, officers asked for the following information necessary for feeding into the outline business case: -

- (i) contact details for your legal advisor
- (ii) comments on the heads of terms
- (iii) a copy of your letter to the Charities Commission
- (iv) agenda, resolutions and notes from the Trustees Board meeting
- (v) confirmation of the extent of the land holdings to be sold. I believe this to be the 1.0 ha site as shown in Appendix 1a of the site design brief.

I am disappointed to note that despite assurances that the above would be available by today, nothing has been received. You will appreciate the tight timescale to which we must work in order to comply with the DCMS requirements and consequently I need the information without delay. Further to the above, I would be grateful for the following additional information:-

1. confirmation of the enhancements to the facilities mix. I believe these to be an additional 2 courts for the main hall, an additional squash court and a building and car park to serve the outdoor facilities. The function room is to have a semi-sprung floor to

cater for aerobics, the 40 spectator seats are to be deleted as a variant bid and the sauna/steam and therapy unit are to be added as variants.

2. the level of investment that the Trust is considering making. I appreciate that this may be difficult to predict without the information on the capital cost of the enhancements and the land valuation.
3. the Trust's position regarding continuing to maintain and operate the outdoor facilities.
4. the Trust's position regarding the location of the outdoor facilities.

I am concerned that we are not making the progress envisaged at this stage. This has led me to instruct the Project Team not to commit any further money or time to this project until I am able to satisfy myself and my members on the feasibility of the Trust's decisions. With this in mind, the meeting, which has been arranged with our leisure and legal consultants on 4 April 2006, has been cancelled.

I feel I must put forward my strong view that unless there is evidence of a willingness on the Trust's part to work with the Council in a more open and co-operative way, the project could fail.

I look forward to hearing from you.

Yours sincerely

Alistair Stewart
Chief Executive

Cc. All Trustees, Tessa Stickler, Cllrs. Carole Waters & David Monk, Judith McCormick, Louise Ewington