



## CABINET REPORT

<b>Report Title</b>	<b>Former Barn Owl Public House</b>
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**AGENDA STATUS: PUBLIC**

<b>Cabinet Meeting Date:</b>	19 <sup>th</sup> October 2016
<b>Key Decision:</b>	NO
<b>Within Policy:</b>	YES
<b>Policy Document:</b>	NO
<b>Directorate:</b>	Regeneration, Enterprise & Planning
<b>Accountable Cabinet Member:</b>	Cllr Tim Hadland, Member for Regeneration, Enterprise and Planning
<b>Ward(s)</b>	Rectory Farm

### **1. Purpose**

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- 1.1 This report outlines an offer received for the relaxation of a restrictive covenant against use of the former Barn Owl Public House other than for a public house.

### **2. Recommendation**

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- 2.1 That Cabinet agrees to release the freehold covenant prohibiting the use of the former Barn Owl Public House, other than as a public house, subject to payment of £30,000 from the owner to the Council and the Council receiving a legally binding agreement for the provision of a room for community use at no charge to the community.

### **3. Issues and Choices**

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#### **3.1 Report Background**

- 3.1.1 A developer has acquired the freehold of the former Barn Owl Public House shown on the Plan at Appendix 1.
- 3.1.2 The developer has received planning permission for redevelopment of the property as a supermarket and has advised that they are, at present, proposing to grant a lease of the premises to the Cooperative Retail Group.
- 3.1.3 There is a restrictive covenant in the freehold title of the site in favour of Northampton Development Corporation (arising from the original sale by NDC on development of Rectory Farm in the mid-1980's) to which the Council have the benefit. This prohibits the construction of anything other than a Public House and subsequent use otherwise than as a Public House.
- 3.1.4 The Council owns the freehold of another retail unit serving the same estate which is let to a Costcutter supermarket. The Council also owns other areas of land in the vicinity.
- 3.1.5 The Council have notified the developer of the restriction in the title and advised that that they should not implement their planning permission without referring the matter to the Council
- 3.1.6 The developers have acknowledged this and have advised that they do not consider the covenant enforceable under anti-competition legislation. They have further advised that they intend to implement the planning permission and will resist any attempt to impose the restrictive covenant through the court system.
- 3.1.7 Counsel's opinion has been obtained by the Council and they have advised that there are good prospects of enforcing the covenant.
- 3.1.8 The developer's solicitors have advised that they have also obtained Counsel's advice and their advice is that the covenant is not enforceable due to anti-competition law.
- 3.1.9 LGSS Law Limited have advised that for the Council to impose the terms of the covenant, they would need to seek a High Court Injunction (which is a discretionary remedy) and which, if contested, could involve significant costs for the Council. The advice is that should the Council lose, they could incur court costs of £50,000 – £100,000. In addition if the market moves against the landowner, while proceedings are in progress, damages for lost opportunity and a reduction in value of the asset might also be an issue. These damages are extremely difficult to firmly estimate in advance but it would not be unreasonable to place the risk in excess of £100,000
- 3.1.10 The Council therefore needs, amongst other things to balance the likelihood of success in proceedings against the financial risk involved. Whilst Counsel's advice is in favour of the covenant being enforceable, this does not

guarantee success or indeed the recovery of all costs incurred in any proceedings.

- 3.1.11 There has been an unsuccessful application by a local community for the pub to be listed as an asset of community value and there have been representations made seeking to secure use of the building for community uses.
- 3.1.12 During discussions with the developer a payment of £30,000 was proposed for the Council's agreement not to enforce the restrictive covenant. The developer also agreed to obtain an undertaking from the tenant that they would provide a room within the building for community uses at no charge.
- 3.1.13 The developer has advised that should the Council successfully prevent the development they intend to leave the site vacant.
- 3.1.14 Cabinet is advised that there are other public houses in the areas of Development Corporation developments where the Council has or may have the benefit of enforceable restrictions on use. The viability of public houses generally is currently a difficult issue for owners and operators and there may be similar cases to the Barn Owl which will arise in future. This report and Cabinet's decision is not intended to establish any policy on this situation and each one will need to be treated on its merits as and when any proposal for change of use is received.

## **3.2 Issues**

- 3.2.1 The enforceability of the restrictive covenant is not definitive.
- 3.2.2 The potential cost of enforcing the covenant should the Council lose are significant.
- 3.2.3 Even if the Council are successful in arguing that the covenant is enforceable, it may in future be discharged or modified by the Upper Tribunal under s84 Law of Property Act 1925 by reason of either:
- 3.2.4 s84(1)(a) "...changes in the character of the property or the neighbourhood *or other circumstances of the case which the Upper Tribunal may deem material...*" ; or
- 3.2.5 s84 (1)(aa) "... the continued existence [of the covenant] would impede some reasonable user of the land for... ...private purposes..."
- 3.2.6 Counsel advised that it would be 'difficult' for the owner to get the covenant lifted but not impossible and so litigation for an injunction might not be an end to the matter.
- 3.2.7 The developer has advised that should they be unsuccessful in resisting the imposition of the restrictive covenant they will leave the site vacant and unoccupied

## **3.3 Choices (Options)**

- 3.3.1 The Council could chose to accept the payment of £30,000 subject to confirmation of a room for community use at no charge. On balance, this is the recommended option in this particular case.

3.3.2 The Council could choose to reject the payment of £30,000 and seek to impose the restrictive covenant through the court system.

## **4. Implications (including financial implications)**

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### **4.1.1 Policy**

4.1.1 This case has been considered on its individual merits and any similar cases, should they arise, will be considered in the same way.

### **4.1.2 Resources and Risk**

4.2.1 Should the Council accept the payment they would incur the legal costs of preparation of an agreement not to enforce the restrictive covenant.

4.2.2 Should the Council choose to enforce the covenant by pursuing an injunction the initial application would cost £8,000- £12,000.

4.2.3 Should the Council pursue the injunction to its fullest extent and (notwithstanding Counsel's advice) fail it could be liable for potential costs of £50,000 – £200,000.

### **4.3 Legal**

4.3.1 As referred to earlier in this report, Counsel's opinion has been obtained on the enforceability of the covenant. That advice is positive that the covenant effectively binds the Barn Owl property and can be enforced notwithstanding the legal arguments (particularly those relating to restraint of trade and competition law) put forward by the owners of the property.

4.3.2 Similarly, Counsel has advised on the prospect of the owner being able to get the covenant varied by the Upper Tribunal were the Council to refuse to release it. Again, Counsel is of the view that such an application, if opposed by the Council, would face significant difficulties.

4.3.3 The owner of the property has indicated a willingness to litigate on the matter but has also proposed a financial settlement and made the offer of arranging for a community room to be made available in the premises after conversion. The costs of litigation have been indicated earlier in this report and scale of the financial risk to both parties would be significant.

4.3.4 Accordingly, Cabinet is in a position to be able to consider the financial offer and wider issues that the circumstances of the matter raise to decide whether or not it wishes to accept the owner's offer.

4.3.5 If Cabinet decided to accept the owner's offer LGSS Law would settle a form of agreement with the owner not to enforce the covenant.

### **4.4 Equality and Health**

4.4.1 N/A

#### **4.5 Consultees (Internal and External)**

4.5.1 Legal, Finance and Governance inputs matters are to be sought.

#### **4.6 How the Proposals deliver Priority Outcomes**

4.6.1 Should the payment of £30,000 be accepted the revenue income to the Council can be used to assist in the delivery of priority outcomes.

#### **4.7 Other Implications**

4.7.1 We are not aware of any other implications arising from the recommendations contained within this report

### **5. Background Papers**

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5.1 A file, reference BOGMM / 01 contains information which is legally privileged and of commercial sensitivity and so is not attached to this report.

**Steven Boyes**  
**Director of Regeneration, Enterprise and Planning**