

URGENT REPORT TO THE LEADER AND CHIEF EXECUTIVE

POTENTIAL VAT SHORTFALL AT THE HEALTHY LIVING CENTRE, CHATHAM

Portfolio Holder: Councillor Vince Maple, Leader of the Council
Councillor Naushabah Khan, Portfolio Holder for Housing and
Property

Report from: Sunny Ee, Assistant Director, Regeneration

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Summary

This report requests the Leader, using urgency powers, to agree a formal undertaking to the NHS that should the HM Revenue and Customs (HMRC) finally declare that the payments made, via the Integrated Care Board (ICB) of the NHS to Medway Council (MC) for the capital works to construct the Healthy Living Centre (HLC) include non-recoverable VAT, then MC will make up the potential shortfall of £2,015,933 on the proviso that the total NHS build cost remains at £14,099,266.

1. Budget and policy framework

- 1.1. The responsibility for the approval of payment relating to a property development is a matter for Cabinet, however additions to the capital programme or virements in excess of £1.0 million are a matter for Full Council, as set out in Chapter 3 (Responsibility for Functions), Part 5 (Financial Limits) of Medway Council's Constitution.
- 1.2. This is however a matter of urgency as the NHS is due to submit their important approval document, the outline business case (OBC), by the beginning of July and it is imperative that another alternative source of funding is offered, should there be a VAT shortfall. Without this in place, the project will be delayed and the necessary target dates to secure the majority funding from the Department of Health and Social Care (DOHSC) will be missed, rendering the project unviable and undeliverable.
- 1.3. The Leader has urgency powers to make decisions which would ordinarily be made by the Cabinet. These provisions are set out in the Constitution

(paragraph 3.2 of Part 3 (Responsibility for Cabinet functions) of Chapter 3 (Responsibility for Functions) of the Constitution.

- 1.4. The Chairman of the Business Support Overview and Scrutiny Committee has agreed that the taking of these decisions are urgent and cannot be reasonably deferred until the next Cabinet meeting on 11 July 2023, in accordance with Section 11 (Cases of special urgency) of the Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012 and Rule 17 (Special Urgency) of the Access to Information Rules (Part 2 of Chapter 4 in the Constitution). This is because delaying the approval of this financial commitment to the Cabinet meeting on 11 July 2023 will delay the submission by the ICB of their OBC.
- 1.5. Additionally, and in line with rule 15.11 of Chapter 4, Part 5 of the Constitution, call-in can be waived where any delay likely to be caused by the call-in process would seriously prejudice the Council's or the Public's interests. The Chairman of the Regeneration, Culture and Environment Overview and Scrutiny Committee has agreed that the decisions proposed are reasonable in all the circumstances and to them being treated as a matter of urgency and to waive call-in.
- 1.6. Furthermore, it is proposed that the Chief Executive uses the urgency provisions as set out in paragraph 4.1 of the Employee Delegation Scheme (including consultation with the Leader of the Council and the Leader of the Conservative Group) to agree the capital virement recommended in paragraph 10.1 below. The use of these urgency provisions will be reported to Full Council on 20 July 2023 for information.

2. Background

- 2.1 Cabinet on 12 February 2019 (Decision No.31/2019 refers) approved the acquisition of the headlease of the Pentagon Centre and in so doing granted "delegated authority to the Chief Legal Officer in consultation with the Leader and Portfolio Holder for Resources, to carry out the re-configuration and improvement works to the Pentagon Centre and to manage and let the centre." There was initially a budget of £5.05M for "Pentagon: Future Capital Works" and with that delegation "to carry out the re-configuration and improvement works to the Pentagon Centre".
- 2.2 Cabinet received an update report in July 2019 which advised Members that ownership of a significant asset such as the Pentagon Centre allowed the Council to consider how else it might intervene to encourage vitality and economic growth in Chatham.
- 2.3 Cabinet on 30 March 2021 (Decision No.41/2021 refers) was updated on the advanced discussions with a public sector organisation (i.e. NHS/ICB) to reconfigure and occupy an area of the Centre. The envisaged project would provide the prospective tenant with the ability to divest itself of other unsuitable property, while providing a rental income to the Council. It would

drive footfall to the centre and improve the overall vitality of this strategic asset. Cabinet approved progressing of the re-development proposal outlined at Exempt Appendix 1 to that report, including the RIBA stage 2 design works.

- 2.4 Council on 24 Feb 2022 (Decision No.707d/2022 refers) added £10,348,000 to the Capital Programme to fund the HLC, on the provision that the NHS would reimburse the full amount. The Council was also awarded grant funding from the Future High Street Fund (FHSF), to assist with the delivery of the HLC and Innovation Hub on the first floor of the Pentagon Centre. The outputs of the projects must be delivered by 31 March 2024. (* Now extended to 31 March 2025).
- 2.5 Subsequently the ICB has increased the overall budget to £14,500,000 in response to inflation and design changes and the NHS build cost to £14,099,276.

3. Options

- 3.1 Option 1 - Do Nothing – The NHS will not be able to submit their OBC in time pending the HMRC review therefore leading to a substantial delay in the programme which inevitably will cause the project to fail with net abortive costs to MC of approximately £500,000.
- 3.2 Option 2 – to undertake a full redesign of the healthy living centre into a smaller footprint and therefore save costs. This is not viable as the NHS funding agreement required delivery of the unit by 31st of March 2025 nor would this provide a suitable or sufficiently sized HLC.
- 3.3 Option 3 - agree the recommendations contained within this report that MC make a formal undertaking to the ICB that in the event HMRC will not agree that the NHS build cost is exempt within the provisions of Section 2 of the NHS Act 2006, that MC agrees to fund the shortfall to a maximum of £2,015,933. **This is the recommended option.**

4. Advice and analysis

- 4.1 The Council has taken professional advice from our tax advisers, PSTAX, who continue to make representations to HMRC that this funding is within section 2 of the NHS Act 2006 and the most recent correspondence confirms that they are actively considering our case with an anticipated all parties meeting being held in the near future.

5. Risk management

Risk	Description	Action to avoid or mitigate risk	Risk rating
HMRC not agreeing in time that VAT is recoverable by MC.	The OBC report will not be submitted in time.	Make undertaking to fund the shortfall in funding.	A1

Likelihood	Impact:
A Very high	1 Catastrophic (Showstopper)
B High	2 Critical
C Significant	3 Marginal
D Low	4 Negligible
E Very low	
F Almost impossible	

6. Consultation

- 6.1 The relevant service departments, the Leader of the Council and the Portfolio Holder for Housing and Property have been consulted and have no objections. The Leader of the Conservative Group has also been consulted on this and has raised no objections.

7. Climate change implications

- 7.1 Utilising the first floor of the Pentagon Centre to accommodate the HLC represents a reduced carbon footprint when compared with the alternative of building a new facility. Additionally, its location within the centre benefits from excellent public transport links and offers co-located shopping trips including everyday food products.

8. Financial implications

- 8.1. The £5.05 million referenced in paragraph 2.1 has largely been committed to other works to the Pentagon Centre and the decision to underwrite any shortfall in funding against the HLC scheme would require Council approval to increase the budget for the scheme.
- 8.2. Officers have identified two potential sources of funding:
- 8.2.1. Option 1: Council could approve the addition of £2,015,933 to the capital programme, funded from borrowing. This would have implications for the revenue budget and the cost of borrowing over 30 years would be around £150,000 per annum.
- 8.2.2. Option 2: The annual Disabled Facilities Grant (DFG) has been underspent over a number of years and the balance brought forward from previous years is in excess of £3.0 million. Officers are confident that £2,015,933 could be vired to the HLC scheme, based on projected spend against the grant. Officers are also confident that it meets the grant conditions, under the third criteria: *“Using a portion of the DFG funding for other social care capital funding purposes (as locally agreed with district councils in two-tier areas)”*.

9. Legal implications

- 9.1. The Council has a legal duty under NHS Act 2006 section 2B (1) to take the steps that it considers appropriate to improve the health of people in its area, including providing health facilities for the people in its area.
- 9.2. The NHS itself is unable to pay the VAT element on top of its grant allowance due to the nature of their statutory functions, therefore Medway Council is being requested to provide an undertaking to cover the VAT element should HMRC not agree that this falls within Section 2 of the NHS Act 2006. Section two is a very broadly drawn provision, similar to the General Power of Competence contained within the Localism Act 2011. It allows the NHS or an Integrated Care Board to “do anything which is calculated to facilitate, or is conducive or incidental to, the discharge of any of its functions”.

10. Recommendations

- 10.1. The Leader is asked, using urgency powers, to agree an undertaking to the Integrated Care Board that the Council will underwrite any VAT shortfall not exceeding £2,015,933 (as set out at paragraph 3.3 of the report) on the proviso that the total NHS build cost remains at £14,099,266.
- 10.2. The Leader is asked to agree that recommendation 10.1 is considered as urgent and therefore should not be subject to call in.
- 10.3. The Chief Executive is asked to agree, using urgency powers, to vire £2,015,933 from the Disabled Facilities Grant to fund any potential shortfall (as set out at paragraph 8.2.2 of the report).

11. Suggested reasons for decision.

- 11.1. The Council considers it imperative that a substantial HLC is secured for Chatham city centre and this will facilitate the submission of the OBC in a timely manner to meet the HLC delivery deadline of 31 March 2025.

Lead officer contact

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Appendices

None

Background papers

None.

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Decision taker – Cllr Maple, Leader of the Council

..... (signed)(date)

Decision taker – Neil Davis, Chief Executive