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1. Background

- 1.1 On 11 September 2017 Cabinet resolved to adopt the Town Centre Masterplan and go out to the market to secure a development partner for Forge Island.
- 1.2 Forge Island occupies a central location within Rotherham Town Centre, with excellent public transport links and an attractive waterside setting. The Masterplan suggested the site would be suitable for a leisure-led mixed-use development, to act as a catalyst for future public and private investment into the town centre. Through an open and competitive process, Muse Developments Ltd. was selected as the Council's preferred development partner in September 2018. Since this date, Muse has been working alongside the Council to bring the Forge Island development forward.
- 1.3 Muse and the Council entered into a "Development Agreement for Lease" which sets out a conditional leasehold structure for the redevelopment of the site. It also documents the various pre-conditions which apply to the project and responsibility for satisfying these. The agreement allows Muse to propose to the Council delivery arrangements that may include (but not be limited to) the Council acting as a funder or purchaser of the whole or part of the Development (but without obligation on the part of the Council to enter any such arrangements).
- 1.4 Key milestones required for construction of the development to start have been achieved: -
 - Muse identified a funder to provide development funding.
 - Muse has appointed a main contractor for the development under a two-stage design and build approach.
 - Designs have been finalised and tender construction packages returned so the scheme is now fully costed.
 - Pre-letting agreements have been secured for the Cinema, hotel and one of the restaurant units with terms agreed on all the remaining units.
- 1.5 Very recent volatility of the financial markets and the challenge this may now pose to private funders providing up-front capital within the requirements previously agreed by the Council has resulted in Muse (in line with the Development Agreement for Lease) assessing delivery arrangements and

proposing options for the Council to consider, including the Council acting as funder of the whole or part of the development.

2. Key Issues

- 2.1 Rising inflation and volatility in the economy and financial markets has made it increasingly difficult to secure private development funding within the requirements previously agreed by the Council (December 2018, and March 2022 Cabinet reports). Inflation has driven up the estimated capital cost of the development, whilst pressures in financial markets means that the level of private development funding is reduced.
- 2.2 These external market conditions are likely to persist and potentially become more difficult. On the 13th September the Council's development partner was informed that the markets were not prepared to lend on the terms previously agreed and as a consequence the Council is required to reconsider the approach to financing the development as a matter of urgency. As a result, a decision on a way forward to deliver the scheme is highly time sensitive due to external factors that were unforeseen and not within the control of the Council.
- 2.3 If the Council is not able to find a suitable funding package for the development of Forge Island quickly, there is a significant risk that the current estimated development costs (secured at present with a developer) will increase due to ongoing inflationary pressures. In addition, delays would risk the Council losing agreements that are in place for third party tenants secured for the development that generate the income to finance the scheme.
- 2.4 The Council acting as funder for the development is an option that will be put before Cabinet on 17th October (subject to Council approval). Following changes in the private investment market and, based on the analysis to date, a review against other delivery options indicates that Council funding may now offer the most efficient and effective delivery route for the scheme, whilst minimising the significant risks outlined above. It may offer significantly better value for money for the Council and the public purse over the lifetime of the development.
- 2.5 It is recognised that changing the delivery arrangements for the scheme to a position where the Council acts as funder will change the nature of the arrangement with Muse. This option would require the Council and Muse to enter into a forward funding agreement (otherwise known as a "development funding agreement") which would create a public works contract.
- 2.6 The Council will only wish to make changes to the delivery arrangements by altering the arrangement with Muse if those changes have a positive impact on the delivery of the project and assist the Council in discharging its best value duties. In implementing any changes to the delivery arrangements, the Council will wish to ensure that it does so in good faith, and in a way that is lawful, with the principles of fairness, transparency, and proportionality in mind.

3. Options considered and recommended proposal

3.1 On the 17th October, Cabinet will consider and decide on the approach that should be taken.

The options to be considered will include: -

1. Adjusting the terms of the development funding agreement with the funder through, for example, extending the term of the head-lease or increasing the initial head-lease rent.
2. The Council acting as funder of the scheme through one of the following routes: -
 - i. A full re-procurement – this course of action would result in considerable delay to delivery, and the very high risk that scheme could not proceed at the current tendered price. This would add significantly to the costs owing to inflationary pressure. Significantly, it would also put at risk the ability to implement the pre-lets already secured. The overall impact is likely to be long term delay of the scheme and a substantial negative impact on the wider regeneration of the town centre.
 - ii. A restricted procurement – this is a complex development scheme; condensing procurement would not allow an alternative developer a reasonable opportunity to assemble and agree the components necessary for the scheme to be costed and delivered.
 - iii. Direct Award to Muse – direct awards may be made using the negotiated procedure without prior publication in circumstances set out in Section 32 of the Public Contract Regulations 2015.

3.2 Option 3 (iii) would require that the Council issue either a Contract Award Notice or a Voluntary Ex Ante Transparency (VEAT) Notice. This decision considers whether the Council should put in place a VEAT Notice to ensure that the Council is transparent in implementing this option and properly notifies the market of the use of Regulation 32 and the agreements that will be entered.

3.3 It is recommended, to ensure transparency in the procurement approach, that prior to entering a direct award that the Council publishes a Voluntary Ex Ante Transparency (VEAT) Notice. The notice will include information on:

- The value of the contract
- The recipient of the contract
- A description of the object of the contract
- The justification for the award of the contract without prior publication which will include unforeseen changes in the financial markets, the exclusive rights held by Muse in relation to the pre-letting agreements, the time pressures imposed by these and the additional

costs to the public purse that would be incurred were these timescales to be missed.

- 3.4 After publishing the VEAT notice, the Council will need to *standstill* for a minimum of 10 calendar days before entering the contact. This is to give other suppliers an opportunity to challenge the award. If challenged during this period, the Council will be required to refrain from entering a contract. After this 10-day period, subject to no challenges being received, the Council may proceed to award and enter a contract. A challenge for damages may be received up to 30 days after the issuing of the Notice and an application for ineffectiveness may still be received up to 6 months post contract signature.

4. Consultation on proposal

- 4.1 The report relates to the process of agreeing a commercial contract and is time sensitive. Public consultation is not applicable in this context.

5. Timetable and Accountability for Implementing this Decision

5.1

	Date	Responsibility
VEAT Notice published	26 September 2022	Head of Procurement
Cabinet Decision on approach to proceeding	17 October 2022	Strategic Director of Regeneration & Environment / Assistant Director Finance and Customer Services & Muse Developments Ltd
Target date for completing Development Funding Agreement	27 October 2022	Strategic Director of Regeneration & Environment / Assistant Director Finance and Customer Services & Muse Developments Ltd
Scheme Completion	Easter 2024	Muse Developments Ltd

6. Financial and Procurement Advice and Implications

- 6.1 The proposal for the Council to fund the scheme does not reduce the potential capital cost of the development, however, it does allow the Council to maintain the current projected development costs at the current secured prices. It also allows the Council to maintain the current third-party tenants that provide the ongoing revenue income to enable the Council to finance the project over the project life.

- 6.2 This proposal removes the need for the private sector funder and replaces it with the Council acting as the total funding provider for the capital works. As such the headlease that would have been paid to the private sector funder,

that would increase with CPI at 3-5%, is replaced with the cost of the Council's borrowing, financing costs. From an annual revenue position, this has the benefit that the Council's financing costs do not inflate and the Council can also structure the financing charges across the life of the project in the most cost-effective way to support the project and the Council's budget.

6.3 It is anticipated that based on current financial markets, that this option would save the Council around £49m over the life of the project. Due to the benefit of Council borrowing over the private sector funder headlease that would be subject to inflation.

6.4 Given the changes in the financial markets that have negatively impacted the original proposal to secure private sector funding, the option of Council borrowing to fund the development becomes the most financial beneficial, stable and deliverable within the confines of the public purse and the Council's delivery aims for the site.

6.5 All procurement implications are included in the main body of the report.

7. Legal Advice and Implications

7.1 Any procurement process may be subject to challenge and an award set aside should the Council be found to be in breach of the relevant regulations and therefore, there is always a contingent legal risk in any procurement process. Owing to the urgent need for action in this case these risks are heightened in that the use of Regulation 32 provides an additional route to challenge that would not ordinarily be available in a more ordinary procurement process.

8. Human Resources Advice and Implications

8.1 There are no known implications.

9. Implications for Children and Young People and Vulnerable Adults

9.1 There are no known implications.

10. Equalities and Human Rights Advice and Implications

10.1 No further equalities and human rights implications identified in addition to those covered by EIA undertaken for March 2022 Cabinet Report.

11. Implications for CO₂ Emissions and Climate Change

11.1 No further emissions and climate change implications identified in addition to those demonstrated for March 2022 Cabinet Report.

12. Implications for Partners

12.1 There are no known implications.

13. Risks and Mitigation

- 13.1 Any procurement process may be subject to challenge and an award set aside should the Council be found to be in breach of the relevant regulations and therefore, there is always a contingent legal risk in any procurement process. Owing to the urgent need for action in this case these risks are heightened in that the use of Regulation 32 provides an additional route to challenge that would not ordinarily be available in a more ordinary procurement process.
- 13.2 The recommendation to issue a VEAT notice is made to ensure the Council acts transparently in this process. The process also allows any potential challenge risk to be identified as early as possible.

Accountable Officer(s)

Paul Woodcock, Strategic Director of Regeneration & Environment

Approvals obtained on behalf of:

	Name	Date
Chief Executive		Click here to enter a date.
Strategic Director of Finance & Customer Services (S.151 Officer)	Named officer	Click here to enter a date.
Assistant Director of Legal Services (Monitoring Officer)	Phillip Horsfield	Click here to enter a date.
Assistant Director of Human Resources (if appropriate)	n/a	Click here to enter a date.
Head of Human Resources (if appropriate)	n/a	Click here to enter a date.
The Strategic Director with responsibility for this report	Paul Woodcock, Strategic Director of Regeneration and Environment	Click here to enter a date.
Consultation undertaken with the relevant Cabinet Member	Cabinet Member for Jobs and the Local Economy - Councillor Lelliott	Click here to enter a date.

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