


## AGENDA ITEM NO

	<b>REPORT TO CABINET TO BE HELD ON 19 DECEMBER 2006</b>
<b>Appendix 3 contains information capable of being treated as exempt from publication</b>	<b>Key Decision</b> <b>Yes</b>  <b>Forward Plan Ref No</b> <b>N/A</b>
<b>Corporate Priority – Creating Healthy and Vibrant Communities</b>	<b>Cabinet Portfolio Holder</b> <b>Councillor Jane Mortimer</b>

**REPORT OF:; Head of Legal and Democratic Services – HLDS/06/72  
And Head of Property Services – HPrp/06/80**

**WARDS AFFECTED: EASTFIELD, SEAMER, FALS GRAVE PARK**

**SUBJECT: PRINCIPLE OF RELEASE OF COVENANT AFFECTING  
LAND OWNED BY SCARBOROUGH FOOTBALL CLUB**

### **RECOMMENDATIONS:**

That Cabinet agree to:

- (i) the principle of release of restrictive covenants in the conveyance of the Seamer Road Football Ground;
- (ii) require that the actual release of the restrictive covenants, be subject to adequate protection being established for any available sums for the purposes for which the covenants were imposed
- (iii) agree to negotiations with Scarborough Football Club (Seadogs) Ltd to establish a Trust into which such sums could be paid
- (iv) to consider the identification of Trustees to ensure future protection of the funds arising from sale of the football ground

### **REASON FOR RECOMMENDATIONS:**

To ensure that the purposes for which the restrictive covenants on the football ground were established are maintained.

**HIGHLIGHTED RISKS: N/a**

## **1. INTRODUCTION**

- 1.1 In 1960 the Council sold the football stadium at Seamer Road to Scarborough Football Club Limited. However, the land was subject to the following covenants:
- (a) That the land was only to be used for the purpose of football or other sport or pastime
  - (b) That no building should be constructed on the land without the Council's consent
  - (c) That the land be maintained in a suitable condition for use as a football ground.
- 1.2 To remove the covenants on the land would require either the agreement of the Council or a decision by the Lands Tribunal upon application by the landowner. If an agreement is to be reached the terms would be negotiated and need to be acceptable to both parties. If an agreement cannot be reached the landowner may ask the Lands Tribunal to release the covenants on the basis that they are outdated. If the Lands Tribunal determines to release the covenants it will also award compensation to the Council

## **2. CORPORATE OBJECTIVES AND THE COMMUNITY PLAN**

- 2.1 This report is relevant to the objective of improving the quality of life, through active participation in leisure and cultural activities.

## **3. BACKGROUND AND ISSUES**

### **3. ISSUES**

- 3.1 Set out in Appendix 2 to this report is a chronology which provides the background to the present financial position of Scarborough Football Club.
- 3.2 On 2 June 2006 the creditors of Scarborough Football Club agreed to allow the newly appointed nominee a period of six months to bring into effect a voluntary arrangement under which the name and assets of Scarborough Football club would be sold to Scarborough Football Club (Seadogs) Ltd, ("Seadogs"). The consideration to be paid would be the sum of money (in the order of £1.9m) needed by the Administrator to meet Scarborough Football Club's debt in accordance with the terms agreed for the voluntary arrangement.
- 3.3 It would be the intention that the new company Scarborough Football Club (Seadogs) Ltd take over the staff, players and ground and continue to provide football.
- 3.4 To fund the purchase of the assets of Scarborough Football Club Ltd, Seadogs have obtained a loan facility from a third party. The third party has indicated however, that it will not provide the loan sum unless and until the Council confirm its intention in principle to release the covenants upon the ground.

- 3.5 If the Council agrees in principle to release of the covenant, Seadogs will enter into the loan agreement with the third party, immediately purchase the assets of Scarborough Football Club, the voluntary arrangement will be put into effect and Scarborough Football Club will then be wound up.
- 3.6 It is then the intention of Seadogs to sell the current football stadium to a developer. The consideration for the stadium has not been finalised. However, Seadogs anticipate that the balance between the sum required to fund the voluntary administration and the sum received for the land will be sufficient to fund the purchase of land at Dunslow Road, adjacent to the proposed Business Park development and to develop that land as a football stadium and leisure facility. Seadogs anticipate that the sum will be supplemented by grant funding.
- 3.7 Negotiations are underway with Caddick (Scarborough) Ltd, who own the site at Dunslow Road and are the proposed developers of Scarborough Business Park which encompasses the identified site for the ground. The principles of agreement have been established.
- 3.8 Seadogs have aspirations that the new stadium be developed to include a number of leisure facilities which have the potential to provide income to subsidise the development. These could include an hotel, conference centre, and commercial sports facilities. There is also the stadium car park which will not be required in full other than on match days. They will in due course be seeking grant funding to assist them to realise their aspirations.
- 3.9 Clearly issues for all those interested in football in Scarborough, is what will happen to the balance sum between the amount received for the ground and the amount required to effect the voluntary administration and whether that sum will in any event be adequate to fund any new ground that is developed.
- 3.10 The sale of the land to the developer will only occur if the Council releases the covenants or they are removed by Court order, thereby allowing the land to be developed so that its full value can be realised
- 3.11 The old ground will have to be sold in order to provide funds for resolution of the voluntary administration and to establish funds for the development of a new ground. Members will wish to ensure on behalf of the Community that any available monies are maintained for the purposes that the covenant was designed to achieve, namely the continuation of sporting facilities in Scarborough.
- 3.12 Clearly it is Seadogs' intention to use the available funds for that purpose. However, were the arrangement they aspire to bring into effect not to proceed, there would inevitably be concern as to what would happen to the remaining funds.

- 3.13 To enable the first stage of the arrangement to proceed however, Seadogs on behalf of their funders have sought confirmation of the principle of release of the covenant.
- 3.14 The period of six months for putting into effect the voluntary arrangement expired on 2 December 2006. On 1 December 2006 an extension of six weeks was agreed by creditors to enable Cabinet to review this proposal.
- 3.15 An alternative approach that has been suggested is that the Council borrow monies to purchase the current ground from the administrator and it sell the ground to a developer and progress the establishment of a new football ground.

#### **4. CONSULTATION**

- 4.1 This report has not been the subject of formal consultation however, the Council has received representations from interested parties and the proposals have been the subject of comment in the media.

#### **5. ASSESSMENT**

- 5.1 If Seadogs acquire the name and assets of Scarborough Football Club, there are two possible routes that Seadogs could follow to seek release of the covenants: either to seek to reach agreement with the Council; or to apply to the Lands Tribunal for release.
- 5.2 However, for Seadogs to acquire the name and assets of the Scarborough Football Club they require a loan from a third party which will only be forthcoming in circumstances in which the Council agrees to the principle of release of the covenant on the Seamer Road land.
- 5.3 The position is therefore circular and no progress can be made without a decision from the Council.
- 5.4 On behalf of Seadogs the administrator has approached the Council with a request that it agrees to the principle of release of the covenants to enable the loan to be provided.
- 5.5 Clearly if the Council agrees to this principle, reliance will be placed upon it by the loan company, who will then provide funds to enable the first transaction to proceed.
- 5.6 The effect of the first transaction is limited to capping the debts of Scarborough Football Club and transferring the debts to Seadogs, who will then have a single loan to the third party loan company and an asset, namely the club and ground.
- 5.7 While the Council would still be able to determine not to release the covenants and the terms for any release, there would be an expectation that,

in the absence of any new factor the Council would in due course release the covenant to enable the sale of the ground to be completed.

5.8 Release of the covenants has a value as the land could not otherwise be developed. There have been a number of cases in the Lands Tribunal over the years which have established the principle of compensation for release or relaxation of covenants and a valuation mechanism. Compensation would ordinarily be valued by considering whether the value of the land when it was originally sold was below that of other land in the locality. If the land was sold at an undervalue compared to other properties as a consequence of the covenants, the difference between what it should have cost and what it would have cost then is brought forward in time by reference to a multiplier. However, value is inevitably affected by the timing of a transaction. In addition there is a risk that the the applicant may not be able to establish before the Lands Tribunal that the covenant no longer has a purpose.

5.9 However, it is clear that if the voluntary arrangement is not effected, the club will be placed into liquidation.

5.10 In those circumstances:

(a) the club in its current form would come to an end and its employees be made redundant, and become preferential creditors in the liquidation

(b) if the club were revived in future it would have to recommence playing football two divisions lower than presently

(c) the administrators would still be required to realize the club's assets ie to sell the football ground,

In those circumstances it would be difficult to sustain an argument that the covenants retained a purpose before the Lands Tribunal. In other words it is likely that the same outcome – that is sale of the current ground – will arise in due course. Furthermore, the consequence of taking the matter through the courts is that the available funds for a new ground are likely to disappear. A summary of the financial position is appended as confidential appendix 3.

5.11 The only way to provide for the intended purpose of the covenants (the maintenance of a ground for sport in Scarborough) appears to be through the safeguarding of funds from the sale of the current ground for the purchase and development of alternative land for the new stadium.

5.12 While the funds available for a new stadium from the sale may not be adequate to provide a stadium of the quality fans would hope to see, that in itself does not militate against the proposal.

5.13 Before consent to the release of the covenant, however, it is essential for the Council to stipulate the conditions that the Council would have in relation to the arrangements for any release of the covenants.

- 5.14 The proposal put forward by the football club is that the freehold land at Dunslow be transferred to the Council. Members may consider it too early to consider such a proposal and be concerned that they would in practice be indicating an intention to take on another responsibility without clarity as to what that would entail.
- 5.15 An alternative would be for the Council to indicate that in principle it is agreeable to release of the covenants, however, the terms for that release would require further negotiation, and in particular would be subject to adequate protection being established for any available sums for the purposes for which the covenants were imposed.
- 5.16 Further negotiations with Scarborough Football Club (Seadogs) Ltd would be required to establish a satisfactory vehicle through which such sums could be managed, on which the Council and Seadogs were represented.
- 5.17 An arrangement that may commend itself to the Council is that the balance remaining after the loan has been paid off be held for the club by a Trust. The monies would be held in Trust with the release of funds being permitted for specific purposes. Release of sums could be permitted for:
- (a) repayment of the loan to the third party
  - (b) purchase of the land for the football ground
  - (c) development of the football ground
  - (d) payment of compensation to Scarborough Borough Council for release of the covenant
- 5.18 At least two trustees would need to be identified for such a Trust, one of whom would need to be an elected member. It may not be necessary for the Trust to be incorporated, as this would itself provide a mechanism for dissolution to the guarantors/shareholders.
- 5.19 The alternative suggested approach that the Council borrow funds to purchase the club and the ground needs to be placed against a background in which the main creditor, H M Customs and Excise, is clear in its intention to seek liquidation of the Club and disposal of its assets to settle the debts (see para 5.10 above). The Council are not in the business of running a football club or developing a football stadium. To adopt such a course of action would be stretching the interpretation of the well being powers to the very limit, and opening the Council to legal challenge. The voluntary arrangement assumes that staff and players of the club will continue to be employed by Seadogs who will take over the club. If the Council were to take the place of Seadogs in pursuit of the current voluntary arrangement the Council would find itself in the position of the employer of the staff and team and carrying the continuing liabilities of the club.
- 5.20 It is clear that the current creditors will not wait for a new voluntary arrangement. In any event, if that new arrangement involved the dismissal of club staff and the football team, the consequential costs would need to be

provided for. If the club were to continue under some new alternate arrangement this would require time to devise and that time is not available.

- 5.21 In summary it is believed that the principle of release of the covenant can be supported to allow the proposed arrangements to proceed, subject to the caveat that there be adequate protection established for the remaining balance sum above the amount required to satisfy the voluntary arrangement.

## 6. IMPLICATIONS

### 6.1 Policy

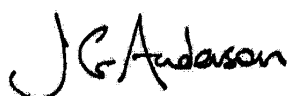
This is an 'in principle' decision and will require ratification by Full Council. Any decision at this stage is likely (subject to the grant of planning permission and further negotiation as detailed within this report) to lead to release of the covenants in due course. This would have the impact of termination of the principle of sporting activity being undertaken at the Seamer Road site.

### 6.2 Legal

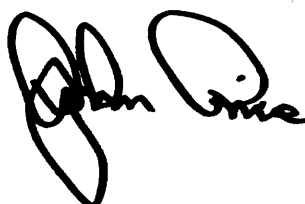
The Legal implications are set out within the body of this report.

### 6.3 Financial Implications

- 6.3.1 The proposed arrangement does not expose the Council to any financial risks and may ultimately provide funding for affordable housing and, through establishment of a trust, seeks to ensure the interests of the Borough are protected.]



**Head of Legal and Democratic Services**



**Head of Property Services**

**Author:** Ian Anderson, Legal and Democratic Services

Telephone No: 01723 232348

Fax No: 0870 238 4159

E-mail address: [Ian.Anderson@scarborough.gov.uk](mailto:Ian.Anderson@scarborough.gov.uk)

### **Background Papers:**

None

IF YOU HAVE ANY QUERIES ABOUT THIS REPORT OR WISH TO INSPECT ANY OF THE BACKGROUND PAPERS, PLEASE CONTACT Ian Anderson, on 01723 232348 or email [ian.anderson@scarborough.gov.uk](mailto:ian.anderson@scarborough.gov.uk)

## Appendix 1

## Risk Matrix

<b>Issue/Risk</b>	<b>Consequences if allowed to happen</b>	<b>Likelihood</b>	<b>Impact</b>	<b>Mitigation</b>	<b>Mitigated Likelihood</b>	<b>Mitigated Impact</b>
<b>The third party loan company pull out of the arrangement</b>	<b>The voluntary arrangement would be terminated and the assets of the company realised for the creditors by the administrator</b>	<b>Not likely</b>	<b>High</b>	<b>None</b>	<b>Not Likely</b>	<b>High</b>
<b>The sum agreed for the purchase of the current ground is inadequate to fund a further ground</b>	<b>The difference in value between the amount required for the voluntary arrangement and the sale price is not protected for sport in the Borough but goes to a third party</b>	<b>Likely</b>	<b>High</b>	<b>Negotiation upon the terms for release of the covenant, grant applications by Seadogs to support funding for the proposed ground</b>	<b>Not Likely</b>	<b>High</b>
<b>Terms cannot be agreed between Seadogs and Caddicks (Scarborough) Ltd</b>	<b>The difference in value between the amount required for the voluntary arrangement and the sale price is not protected for sport in the Borough but goes to a third party</b>	<b>Not likely</b>	<b>High</b>	<b>Creation of vehicle for management of funds within which the Council have decision making powers</b>	<b>Not likely</b>	<b>High</b>

<b>The covenants are released and Seadogs do not construct the ground and liquidate the assets of the company for shareholders</b>	<b>The difference in value between the amount required for the voluntary arrangement and the sale price is not protected for sport in the Borough but goes to a third party</b>	<b>Likely</b>	<b>High</b>	<b>Creation of vehicle for management of funds within which the Council have decision making powers</b>	<b>Not Likely</b>	<b>High</b>
<b>Agreement is not reached on the terms for release of the covenant with Seadogs Ltd</b>	<b>Application to the Lands Tribunal for a determination,</b>	<b>Likely</b>	<b>Medium/ Low</b>	<b>Agreement upon the valuation of the proposed option</b>	<b>Not Likely</b>	<b>Low</b>
<b>The proposed arrangements do not result in a viable football club.</b>	<b>Further financial difficulties for the Club.  Difficulties for the management of the new stadium.</b>	<b>Not likely</b>	<b>High</b>	<b>The use by the Club of the new ground is regulated by an appropriate agreement.</b>	<b>Not likely</b>	<b>Low</b>

Appendix 2

Date	Event	Commentary/detail	Administrators
2000/1	First voluntary arrangement entered into with creditors and members (shareholders). :	Continuing financial problems, resulted in:	
14/1/2003	Company go into Administration;	Administrators appointed and negotiate second voluntary arrangement	Messrs.Loftus and Walker of Haines Watts
6/6/2003	Second voluntary arrangement entered into with creditors,	Proposed deal: 1.Assets of Scarborough Football Club to be sold to Scarborough Football Club (Seadogs) Ltd a dormant company controlled by the present Chairman, Malcolm Reynolds 2. Consideration to be £1,565,000 of which £200,000 to be paid within seven days 3. Balance to be paid upon the grant of planning permission 4. Secured debts covered in full, 5. unsecured debts to be paid to minor creditors at 25p in the pound	Messrs.Loftus and Walker of Haines Watts

14/6/2003	Breach of Voluntary Arrangements	Monies not paid within seven days as required, however, no action taken	Messrs.Loftus and Walker of Haines Watts
21/11/2003	Change of Administrator	Mr Walker resigned	Mr Loftus of Haines Watts
May 2004	Change of Administrator	Mr Loftus left Haines Watts and set up Loftus and Co	Mr Loftus of Loftus and Co
27 May 2005	Change of Administrator	Mr Loftus resigned his appointment, Mr Kirkwood (EJK) appointed	Mr Kirkwood of EJK Associates
January 2006	SBC request Begbies Traynor to review voluntary arrangement	Begbies Traynor advise SBC that the Voluntary arrangement has been irretrievably breached	Mr Kirkwood of EJK Associates
3 March 2006	Letter SBC to Seadogs	SBC write to SFC (Seadogs) Ltd requesting an explanation of present situation	Mr Kirkwood of EJK Associates
21 March 2006	Letter Seadogs SBC	Indication that sale price negotiated (see confidential appendix) and sale progressed	Mr Kirkwood of EJK Associates
3 April 2006	Letter SBC Seadogs	SBC write to Football Club seeking a meeting	Mr Kirkwood of EJK Associates
6 April 2006	Meeting with SBC/SFC (Seadogs) Ltd, Begbies Traynor in attendance at request of SBC	Football club acknowledge problems re voluntary administration, however, negotiations for sale of ground/proposals for planning permission at an advanced stage; Consideration given to Begbies Traynor becoming administrators	Mr Kirkwood of EJK Associates

10 May 2006	Begbies Traynor appointed as nominee in respect of proposed voluntary arrangement	High Court hearing	Rob Sadler, Begbies Traynor
10 May 2006	Proposal to Creditors and Members	Costs of the Administration in period 6/6/2003 to 2/6/2006 identified together with liabilities beyond this sum	Rob Sadler, Begbies Traynor
2 June 2006	Meeting of Creditors and Members (Shareholders)	Acceptance of proposal for new voluntary arrangement, namely: 1. Each professional firm to write off some of its fees to provide funds for unsecured creditors to receive 25p in the pound 2. Bridging loan to be obtained by SFC (Seadogs) Ltd to buy assets of company 3. Arrangement to be effected within 6 months of commencement of agreement	Rob Sadler, Begbies Traynor
Summer 2006	Bridging loan negotiated	Loan company agree to provide to SFC (Seadogs Ltd) bridging loan subject to condition that SBC confirm its intention to release covenant.	Begbies Traynor
6 October 2006	Letter from Begbies Traynor	Request for confirmation that SBC willing to release covenant – consideration for that release subject to negotiation	Begbies Traynor

21 November 2006	SBC Cabinet	SBC defer decision upon agreement in principle to release of the covenant.	Begbies Traynor
1 December 2006	Creditors' Meeting to consider way forward, agreement to six week extension of voluntary arrangement	Six months expired following original voluntary agreement	Begbies Traynor