	REPORT TO CABINET TO BE HELD ON 19 JUNE 2007
	Key Decision Yes Forward Plan Ref No N/A
Corporate Priority – Creating Healthy and Vibrant Communities	Cabinet Portfolio Councillor Holder Jane Mortimer

JOINT REPORT OF: Strategic Director of Corporate Services – SDCS/07/41, Head of Legal and Democratic Services – HLDS/07/032 and Head of Property Services – HPrp/07/037

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

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

RECOMMENDATION (S):

That Cabinet note the request for release of the covenants on the McCain stadium and refer it for consideration by Council supported by a further update report

REASON FOR RECOMMENDATION (S):

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

HIGHLIGHTED RISKS:

The value of the covenants on the land to the Borough may be lost.

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 or purposes ancillary thereto without the previous written consent of the Council
 - (b) That no building be constructed on the land without the Council's consent
 - (c) That the land be maintained in a suitable condition for use as a ground for football or other sport or pastime or purposes ancillary thereto
- 1.2 In addition the Council retained first right to buy back the land at fair market value, within 28 days of it being offered the land, subject to it paying a fair market price. In the absence of agreement upon a fair market price the price is to be determined by either a jointly instructed "umpire" (appointed in accordance with Arbitration legislation) or in the alternative two referees.
- 1.3 A fair market price would take account of the fact that the Council owns land adjacent to the Football club and has the ability to enforce the covenants on the land.
- 1.4 Were the Council to determine not to purchase the land it is inevitable that the Liquidator would seek the Council's agreement to remove the covenants on the land. 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cannot be reached the liquidator would ask the Lands Tribunal to release the covenants on the basis that they are outdated following the demise of the football club. If the Lands Tribunal determines to release the covenants it would be invited to 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

ISSUES

- 3.1 On 2 June 2006 a proposal was recommended to the creditors of Scarborough Football Club by Mr Sadler of Begbies Traynor to provide the club with a period of six months to effect a voluntary arrangement under which the name and assets of Scarborough Football Club would be sold to Scarborough Football Club (Seadogs) Ltd or a newly established company for a sum that would provide £1.65 m in total to the creditors of the club and provide a substantial balance of funds for the establishment of a new ground in the Borough. The existing club would then be wound up. On 1 December 2006 an extension of six weeks was agreed by creditors to enable the Council

to review the proposal. To fund the purchase of the assets of Scarborough Football Club Ltd, a loan facility from a third party was available to a new company to be established to undertake the transaction.

- 3.2 The CVA proposal came before Cabinet on 19 December 2006 and thereafter was considered by Full Council on 8 January 2007.
- 3.3 Council were advised that if it agreed in principle to release of the covenant, a new company would be established with which the Council could negotiate. The proposal was that the new company enter into a loan agreement with the third party to purchase the assets of Scarborough Football Club. Subject to agreement by the Football Association to transfer the right to play football to the new company, Scarborough Football Club Ltd would then be wound up. The new company intended to use sale proceeds generated by sale of the ground together with grant funding from the Football Association to build a new ground on land owned at Dunslow Road.
- 3.4 Council were led to believe that the balance between the sum required to fund the voluntary administration and the sum received for the land, together with grant funding would be sufficient for the new company to fund the purchase of land at Dunslow Road, adjacent to the proposed Business Park and to develop that land as a football stadium and leisure facility that met Conference League standards.
- 3.5 The proposal was at an early stage of development, and what was sought from the Council was agreement to the principle of release of the restrictive covenants to provide a basis for negotiations.
- 3.6 At full Council on 8 January 2007, informed by that report the following decision was made:
RESOLVED that Council
- (i) agree to 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) **agreement to negotiations with such corporate body as may propose to take over the assets of the club;**
 - (iv) **in the event that the negotiations were successful, to establish a Trust** into which available sums could be paid and held for the following purposes:
 - a. repayment of the loan provided to put into effect the voluntary arrangement
 - 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
 - e. match funding for sport within the Borough
 - (v) it be recommended that the Director of Corporate Services together with a appropriate Elected Member be appointed to such a Trust to

ensure future protection of the funds arising from sale of the football ground.

- (vi) **An advisory body of members, officers and such external advisors as may be required be established to advise on this issue.**

Reason:

To ensure that the purposes for which the restrictive covenants on the football ground were established are maintained and the Council's interest in the land safeguarded.

- 3.7 Subsequent to the meeting of Council an extension of the Voluntary Arrangement to 13 April 2007 was granted to enable the proposed negotiations to proceed.
- 3.8 The advisory group of officers and members was established and a number of meetings have taken place with the Football Club and others subsequently.
- 3.9 In the event, Scarborough Football Club Ltd were unable to put into effect the Voluntary arrangement by 13 April 2007 as was required. Consequently the Voluntary arrangement failed on that date.
- 3.10 The effect of this was that in place of the £1.65 m to which the creditors had agreed, were the sale of the club to be effected prior to 13 April, the debts of the club were re-instated in full. The former supervisor of the administration has advised that these debts now total of the order of £2.5 m.
- 3.11 To compound matters, the club were relegated from the Conference League. The effect of this was that grant funding that was potentially available to the club was reduced. It is understood that grant funding accessible from the Football Foundation to the club alone is of the order of £150,000.
- 3.12 The Club wrote to the Council on 1 June 2007 requesting that a meeting of full Council be convened and that Council consider release of the covenants and the rights of pre-emption held by the Council at this stage to enable the football club to sell the ground to private developers for £2.1 m plus an overage sum, the value of which was dependent upon the nature of planning consent granted upon the land, however, the sum could amount to nothing. The offer that the Club received was predicated upon agreement to the absolute and unconditional release of the Council's covenants and rights of pre-emption at a future date. This was declined.
- 3.13 A revised proposal has now been discussed with the club and the developers although the full terms are in development.
- 3.14 A new site for the ground has been suggested on land presently within the control of the Pindar School. The Pindar school are intending to pursue an application for Trust status.
- 3.15 If Trust status is achieved the land occupied by the school, will transfer from the County Council to a Trust. The school propose to develop a part of the

land as a stadium that will be shared with the football club. The stadium is proposed to meet Vauxhall Conference standards for the football club but be a multi-purpose facility that satisfies the requirements of the school and the football club and contributes to the community. In this way the school anticipate that a Trust will be able to attract wider grant funding than is presently available to the club alone.

- 3.16 The Trust will own the stadium and the Borough Council have been invited to consider appointing a Trustee or Trustees if the Trust is established.
- 3.17 While a ground is being built, and an application for planning consent in relation to the present ground is considered, it is proposed that the football club will continue to use the current ground.
- 3.18 Planning services have advised that no form of retail use is likely to be acceptable on the McCain stadium. They advise that any application that includes retail use will ultimately be determined by the Secretary of State following call in. However, Planning Services acknowledge that an appropriate scheme for residential use of the land would be more likely to be granted planning consent.
- 3.19 However, the property developers have indicated an intention to pursue a mixed use retail and residential scheme on the current site.
- 3.20 Clearly any new administrative arrangement would require the agreement of creditors, which at present is far from certain. The proposal put forward by the club on 1 June was discussed with the former administrator of the voluntary arrangement who advised that no agreement to this had been given and the Council's agreement to the proposal would simply remove one hurdle toward agreement on a solution.
- 3.21 Clearly a significant number of uncertainties remain, however, the suggested advantage of what is understood to be the revised proposal is that the Council will retain their covenants unless or until a new stadium is constructed.

Alternate Option

- 3.22 In March 2007 an Industrial and Provident Society, Scarborough FC Supporters Society Ltd was separately formed as a limited company. The Board of Directors have no connection with the current board of Scarborough Football Club Ltd. And have had no involvement thus far with the Council.
- 3.23 On 10 June 2007 Scarborough FC Supporters Society Ltd separately applied for a member share in the North East Counties Premier or 1st Division in the name of "Scarborough Athletic". If granted this will enable the club to play in one of these divisions. They have made provisional arrangements to enable them to play football from a ground. A separate proposal has been put forward in the name of AFC Scarborough for entry to the same league. The two applications have been deferred until 24th June 2007 pending the hearing

of the petition for liquidation in relation to Scarborough Football Club Ltd on 20 June. It is understood that the League are willing to accept one application.

- 3.24 It is understood that Scarborough Football Club currently has obtained a member share in the Premiership of the Unibond League (the League above the North East Counties league).
- 3.25 The Council has commenced a review of sports provision within the Borough. A Sports summit was recently held, and a new ground could offer a facility that may provide a valuable contribution for sport within the Borough.
- 3.26 In liquidation it is open to the Council to exercise its right of pre-emption and authorise the borrowing of monies to purchase the current ground itself at a fair market price. The determination of what will be a fair market price is difficult to predict and is dependent upon the market.
- 3.27 Clearly if the club were liquidated the Council would have a short window of opportunity to determine whether to borrow the necessary monies to buy the land. If it did not take the opportunity it is inevitable that the liquidator will argue that the purpose for which the covenants on the land were imposed no longer exists following the demise of the club and seek to remove the covenants as being outdated. The liquidator may argue this in any event.
- 3.28 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.

4. CONSULTATION

- 4.1 This report has not been the subject of formal consultation given the time constraints.

5. ASSESSMENT

- 5.1 The original proposal put forward by the Scarborough Football Club was considered in detail in the report to Cabinet of 19 December 2006. Agreement was given to the principle of release of the existing covenants on the current ground on the basis that negotiations would develop a proposal that would allow for the purpose for which the covenant was originally proposed – that is retaining land for the purpose of football and sport within the Borough - would be maintained through the establishment of a new ground.
- 5.2 What is understood to be the revised proposal has some similarities to that proposal, inasmuch as it is proposed that land occupied by the Pindar School will be developed by the developer as a stadium for the community – including the Football Club – but to be owned by the proposed Pindar School Trust.

- 5.3 The suggested attraction of what is understood to be the revised proposal is that the Council will not be required to release its covenants on the land unless and until a new ground is constructed. However, the detail of the proposal is not presently entirely clear.
- 5.4 The Board of Governors indicated in principle support for the proposal at a meeting of the Governing Body on 14 June 2007. It is understood that the Governing body and Headteacher consider that a stadium within the grounds of the current school offers significant advantages to the school in progressing the sporting education of pupils and the Community at large. The design of the proposed ground will need to take account of the aspirations of the school and the Community to attract grant funding. However, such grant funding cannot be taken as guaranteed.
- 5.5 The advantage to the Football club will be that it will not have to carry the entire running costs of the ground which will assist its longer term viability. Furthermore, it is understood that the proposed developers are willing to provide revenue support to the club in the next few years to assist it gain a firmer financial footing for the future.
- 5.6 However, it will be the Trust, if acquired, and not the Governing Body that will hold the assets of the school. It is understood that the school intends to consult on the proposal to acquire a Trust to hold its assets and property.
- 5.7 The decision upon whether to acquire a Trust is ordinarily taken by the governing body, following consultation with the local authority, parents and other stakeholders. However, there is power to refer proposals to the Schools Adjudicator to make the decision in certain circumstances.
- 5.8 Planning consent will of course also need to be applied for and obtained for development of the land as a football stadium. It is understood that Planning Services regard the proposal to be possible in principle, subject to consideration of a detailed application.
- 5.9 However, for the proposal to proceed the proposed developers and the football club have asked for confirmation that the Council will remove its covenants on the land in the event that a new stadium is established.
- 5.10 In the meantime the creditors of the company are being approached to determine their willingness to accept the proposal.
- 5.11 In the event of liquidation the liquidator will need to sell the ground to liquidate the assets of the company. Under present covenants the liquidator is required to serve notice upon the Council of an intention to sell the ground. The Council would have 28 days to consider this proposal. The merits of purchasing the ground to enable it to continue to be considered as an alternative as part of the portfolio of leisure assets within the Borough would need to be considered.

- 5.12 Were the Council to seek to buy the ground the liquidator, on behalf of the creditors, would be obliged to seek the maximum capital receipt for the ground. Failing agreement on a fair market value, valuation would be referred to an arbitrator for determination of a fair market price.
- 5.13 A fair market price would need to take into account the current restriction that exists upon the use of the ground through the covenants. However, it would also need to take into account alternate offers received for the ground by the liquidator – with the covenants in place or otherwise. It is difficult at present to assess the value that would be placed on the land by an independent arbitrator as this will be affected by any offers for the land that the liquidator receives with the covenants in place and the assessment of how likely it is that the Council will be able to defeat an application for removal of the covenant.
- 5.14 If in liquidation the Council did not take the opportunity to exercise its right of pre-emption the liquidator would be obliged to pursue sale of the ground to alternate purchasers.
- 5.15 If the club is liquidated and the Council fails to act to buy the ground, it is likely that the liquidator would clearly argue that the purpose for which the covenant was originally imposed has ceased following the demise of the football club. If such an application were ultimately to come before the Lands Tribunal for determination.
- 5.16 The proposal put forward by the club still has a significant number of uncertainties, however, should the club not be wound up on 20 June, it will need to be considered by Council on 9 July supported by an update report.

6. IMPLICATIONS

6.1 Policy

6.1.1 The Council has previously sought to protect land including the football ground on Seamer Road for sport within the Borough by the imposition of covenants.

6.1.2 This item will require the approval of Full Council.

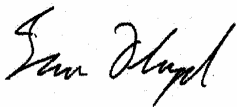
6.2 Legal

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

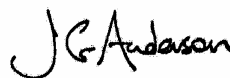
6.3 Financial Implications

6.3.1 To agree to release the covenants the Council would need to consider the loss in value of its interest in the land arising from loss of the covenants and acquiring an alternate

- 6.3.2 Looking at the wider interests of the Borough it is conceivable that the requisite consideration for release of the covenants may be achieved through constructing an arrangement that ensures the establishment of a new ground owned by a Pindar School Trust with the Council appointing a Trustee or Trustees.
- 6.3.3 The alternate possibility canvassed that the Council consider the purchase of the ground would require borrowing. The Council is able to borrow funds under the Prudential Borrowing regulations. This allows all Councils to incur such borrowing as it considers to be affordable. It is the Council's current policy not to incur borrowing for capital schemes, given the financial pressures on the revenue budget.
- 6.3.4 Therefore, were a purchase of the ground contemplated, in order to fund any potential purchase, the Council would need to be satisfied that this represents an exceptional situation and that such borrowing is "affordable".
- 6.3.5 In practical terms the "borrowing" that the Council would incur would be from internal investments it already holds, and would represent "internal borrowing". No external borrowing would be incurred, rather the level of investments held on deposit would be reduced. The impact of this is that there would be a loss of interest receipts, of the order of £60,000 for every £1m of internal borrowing. It is considered that this can be accommodated from the overall treasury management activity, which continues to perform well, showed a surplus as part of 2006/07 accounts, and recent interest rate rises have also had a beneficial impact.
- 6.3.6 Were a decision made to incur borrowing, in the medium term the Council should ideally look to repay back any internal borrowing therefore for purchase of the site to be contemplated it would need to be seen as an opportunity that ultimately led to a capital receipt in some form. Either directly related to the site or otherwise.
- 6.3.7 In addition to capital costs, in the event of purchase of the ground the Council would incur business rates on the ground, the sum in the current year is £8,880. There is provision that could meet these costs within the treasury management budget.



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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

Appendix 1

Risk Matrix

Issue/Risk	Consequences if allowed to happen	Likelihood	Impact	Possible Mitigation	Mitigated Likelihood	Mitigated Impact
The value of the covenants to the Borough is lost	The liquidator seeks to remove the covenants on the basis that they are outdated following the demise of the football club	Almost certain	High	Refuse release of covenants until new ground built Decision by the Council to agree to buy the ground	Not Likely	Medium
A Pindar School Trust is not established	The club is liquidated	Not likely	High	Refuse release of the covenants until new ground is built	Not Likely	Medium
The Trustees of the Pindar School Trust do not agree to the proposal	The club is liquidated	Not Likely	High	Refuse release of the covenants until new ground is built	Not likely	Medium
In the event of a decision to buy the ground, a price for the land cannot be agreed with the liquidator	The ground is unused and becoming vandalised	Likely	High	Speedy referral to an arbitrator if agreement cannot be reached within a defined period	Not Likely	Medium
The Council incurs borrowing, with no future return in relation to capital receipt or revenue return	Revenue costs associated with borrowing	Likely	High	Ensure any purchase is linked to a wider review of opportunities for development/rationalisation which ultimately leads to a financial return for the Council	Not Likely	Medium

Issue/Risk	Consequences if allowed to happen	Likelihood	Impact	Possible Mitigation	Mitigated Likelihood	Mitigated Impact
The Unitary Bid by the County Council proceeds	Blocks placed in the way of progressing any proposed purchase of the ground and the review of leisure facilities	Likely	High	Consultation with the County Council upon the proposal prior to the meeting of full Council with a view to arriving at a joint position	Not likely	Medium
The Council agrees to buy the ground	The leisure asset sits vacant and unused and is vandalised	Likely	High	Speedy consideration of the ground together with adjacent land owned by the County Council within the wider review of leisure assets within the Borough	Not Likely	High

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
27/5/2005	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
3/3/2006	Letter SBC to Seadogs	SBC write to SFC (Seadogs) Ltd requesting an explanation of present situation	Mr Kirkwood of EJK Associates
21/3/2006	Letter Seadogs SBC	Indication that sale price negotiated and sale progressed	Mr Kirkwood of EJK Associates
3/4/2006	Letter SBC Seadogs	SBC write to Football Club seeking a meeting	Mr Kirkwood of EJK Associates
6/4/2006	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

10/5/2006	Begbies Traynor appointed as nominee in respect of proposed voluntary arrangement	High Court hearing	Rob Sadler, Begbies Traynor
10/5/2006	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
2/6/2006	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 new company 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 a new company a bridging loan subject to condition that SBC confirm its intention to release covenant.	Begbies Traynor

6/10/2006	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
1/12/2006	Creditors' Meeting to consider way forward, agreement to six week extension of voluntary arrangement	Six months expired following original voluntary agreement	Begbies Traynor
19/12/2006	SBC Cabinet	Recommend to Council agreement to the principle of release of the covenant on the basis of proposal within the CVA that available funds would provide for establishment of a new ground, but to require that any funds for this purpose be protected for this purpose by the creation of a Trust to which the Council were a Trustee. The Trust to be empowered to use the available funds for sport in the Borough if for any reason a new ground was not established.	

January 2007	SBC Council	Agreement to principle of release of the covenant given on the basis that a new ground would be established for football, with the proviso identified by Cabinet of the establishment of a Trust to ensure protection of available funds for the new ground. Advisory Group established to oversee the process.	
13/4/2007	Creditors' meeting	The club having failed to put in place the necessary arrangements to affect the CVA, the CVA failed and existing creditors are re-instated in full	Begbies Traynor
May 2007	Football performance	Scarborough Football Club relegated from the Vauxhall Conference League to Unibond League	
1/6/2007	Proposal Scarborough Football Club to SBC	Scarborough Football Club request the Council to consider a revised proposal predicated upon entry into a new voluntary arrangement which offers no guarantee of either a new football ground for the club or funds for sport in the Borough	

12/6/2007	Hearing High Court to consider liquidation of Scarborough Football Club	Adjourned to 20 June 2007	
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