

## **EAST AYRSHIRE COUNCIL**

**CABINET – 04 NOVEMBER 09**

### **KILMARNOCK FLORAL CLOCK – LEGAL AGREEMENT**

#### **Report by Depute Chief Executive/ Executive Director of Corporate Support**

#### **1. PURPOSE OF REPORT**

- 1.1** To update Cabinet on the progress with the Kilmarnock floral clock project and to agree the way forward in relation to a License Agreement with Network Rail, to safeguard the Council's investment in the site.

#### **2 BACKGROUND**

- 2.1** On the 8 July 2009 Cabinet agreed to proceed with the Kilmarnock Floral Clock project on a phased basis; to authorise the Head of Planning and Economic Development to appoint a contractor to carry out the work on site, subject to the necessary funding becoming available; and that the Council enter into a licence agreement with Network Rail to safeguard the Council's investment in the project.

#### **3. PROJECT PROGRESS**

- 3.1** Planning permission was granted for the project on 31 July 2009. Listed Building Consent for the works to the retaining wall on the "B" listed Kilmarnock Railway Station was granted on the 6 October 2009.
- 3.2** Confirmation has been received from the Railway Heritage Trust that they will contribute £80,000 towards the cost of the project. The outcome of the CARS grant application for £30,000 is due to be determined prior to the end of October 2009.
- 3.3** Following a full tender process in compliance with the Council's Standing Orders, David Wilson Associates (DWA) of Cadzow Street, Hamilton have been appointed to manage the project. Following a tender process by DWA provided for in terms of their appointment by the Council, Kelburne Construction of Inkerman Place, Kilmarnock have been selected as preferred main contractor to carry out the work on site. The contract is to be concluded on approval of the funding and completion of the Licence Agreement with Network Rail. An extension to the contract acceptance period has been sought from the preferred contractors.
- 3.4** As an extension to the proposed floral clock project, a bid has been made to the Scottish Government's Town Centre Regeneration Fund to carry out significant public realm improvements throughout the town centre, including

the area to the front of the floral clock. If this bid is successful, this will result in further improvements to this prominent location.

#### **4. LICENCE AGREEMENT WITH NETWORK RAIL**

- 4.1** As reported to Cabinet on 8 July the floral clock site and retaining wall is owned by Network Rail and leased to Scotrail by way of a franchise agreement. Negotiations have been entered into with Network Rail with a view to concluding a licence agreement which would allow the Council to carry out the works and occupy the site for a period of 20 years, which is required to allow the Council to protect it's investment.
- 4.2** At the time of reporting to Cabinet on 8<sup>th</sup> July negotiations had commenced with Network Rail with a view to concluding a licence agreement which would allow the Council to occupy the site for a period of 20 years which is considered necessary to protect it's investment. Since that time a number of issues have arisen in the course of negotiation which require to be considered by Cabinet prior to concluding the licence agreement. In particular it was initially proposed by Network Rail within the terms of their standard licence agreement that Network Rail could terminate the licence on giving six month's written notice to the Council at any time. It was further proposed that should the agreement be terminated no compensation would be due to the Council. The inclusion of these provisions would not have allowed the Council to protect it's investment
- 4.3** However, Network Rail has now agreed that the termination clause will only be exercised if the land is required for operational railway use eg. if either the turning circle or pedestrian access into the station failed and required stabilising and the only option was to use some land from the area proposed to be occupied by East Ayrshire Council.
- 4.4** Network Rail has also agreed to pay the Council compensation should they be required to implement the termination clause. A sliding scale has been proposed based on Scottish Government guidance. Network Rail are proposing that they pay back any grants made to the Council to facilitate development of the proposal that may have to be repaid by the Council in the event of termination at a rate of 50% for up to 5 years, 20% for 6-10 years and 10% for 11 - 20years. They have also agreed to pay the Council's capital expenditure only if the licence is terminated within the first ten years of the agreement. Network Rail will repay the Council's capital expenditure at the following rate of 50% for up to 2 years, 20% for 3-5 years and 10% for 6-10 years. No compensation would however be payable if the Agreement were terminated at the end of the licence period. The levels of compensation are outlined in the table below:

|   |                                   | <b>EAC Capital expenditure</b> | <b>External grant funding</b> |
|---|-----------------------------------|--------------------------------|-------------------------------|
|   | <b>Total investment (phase 1)</b> | <b>£205,080</b>                | <b>£110,000</b>               |
| Amount of compensation to be awarded if license is terminated in: | 1 – 2 years                       | £102,540                       | £55,000                       |
|   | 3 – 5 years                       | £41,016                        | £55,000                       |
|   | 6 – 10 years                      | £20,508                        | £22,000                       |
|   | 11 – 20 years                     | Nil                            | £11,000                       |

**4.5** If the Council were to want Network Rail & First ScotRail to consider the removal of this termination clause altogether Network Rail have advised that this will take a period of approx 9 months. Network Rail will have to use Licence Condition 7 of their operating licence which covers disposal of Network Rail land for non operational uses either for permanent disposal or to be leased without a termination clause. Network Rail has to carry out various levels of consultation and regulatory approvals with Transport Scotland, the wider rail industry and the Office of the Rail Regulator under this condition to prove beyond reasonable doubt that there is no railway use for this land. There is no guarantee that approval to remove this clause will be approved following this 9 month period. Indeed initial indications from First ScotRail suggest that they would oppose the removal of this clause. If this was to transpire formally then Network Rail doubt they could gain the Office of the Rail Regulator's consent to the proposal.

**4.6** Given the above it would appear that there are two options:-

- (i) Option 1, we acknowledge that the level of risk is low and we agree to Network Rail's Draft Heads of Terms for the Licence Agreement including the termination clause now as clarified by Network Rail and including provision for compensation should Network Rail have to exercise the termination clause. Alternatively,
- (ii) Option 2, we ask Network Rail to start the process to seek the removal of the termination clause that will take approximately 9 months, accepting that if this it is not agreed by all parties the project cannot proceed.

**4.7** It is considered that we should pursue Option 1, subject to the final agreement of the termination clause and the inclusion within it of the provision for compensation should Network Rail have to exercise the termination clause. Whilst it is acknowledged that the level of risk is low, it still exists and, if realised, could still cause significant but ultimately abortive expense. However, the provision of compensation will minimise the Council's risks in relation to this agreement.

## **5 FINANCIAL IMPLICATIONS**

- 5.1** The financial implications are as per the 8 July 2009 Cabinet report. The current cost projection of the complete scheme is anticipated to be in the region of £350,000. However, as per the previous cabinet decision, the project is being taken forward on a phased basis, the first phase of which will cost in the region of £305,000, excluding fees.
- 5.2** A sum of £209,030 has been allocated from the Leaders Initiative budget for the floral clock project. An offer of grant of £80,000 has been secured from the Railway Heritage Trust and a CARS grant of £30,000 has been applied for, bringing the available funding up to approximately £320,000.
- 5.3** It should be noted that if the Council were to pursue Option 2 the Council would be liable for the legal costs associated with this, estimated by Network Rail at up to £10,000 approximately.

## **6. PERSONNEL IMPLICATIONS**

- 6.1** There are no personnel implications directly associated with this report.

## **7. LEGAL IMPLICATIONS**

- 7.1** As discussed in section 4 above, a formal agreement with Network Rail is required in order to protect the Council's substantial investment in this site. In relation to this, this report is recommending Option 1, on the basis that a clause is included within the license agreement to require compensation to be paid to the Council should the termination clause be exercised by Network Rail.

## **8. POLICY IMPLICATIONS**

- 8.1** The implementation of this project is in accordance with the Environmental Policies within the East Ayrshire Local Plan and the East Ayrshire Local Plan Alteration (Finalised Version with Modifications). The project also contributes towards meeting the aims of the Kilmarnock Town Centre Strategy and the Conservation Area Management Plan.

## **9. COMMUNITY PLANNING IMPLICATIONS**

- 9.1** The floral clock improvement project directly links to the Community Planning theme 'delivering community regeneration' which aims to regenerate our town centres and villages, and deal with run down areas

## **10. RISK MANAGEMENT IMPLICATIONS**

- 10.1** The contractors appointed to carry out the project will be required to complete the Council's standard insurance questionnaire and to have all appropriate insurance cover in place, including public liability cover of £10 million.
- 10.2** Due to the nature of the site with its steep slope and its location at a key road junction, the project carries significant risks in terms of health and safety issues. The design of the scheme attempts to mitigate any risks, specifically with the inclusion of a safety fence at the foot of the scheme, the risks will nevertheless still be present.
- 10.3** As the site is owned by Network Rail, liability of the site currently remains with Network Rail. However, the licence agreement will largely transfer responsibility and liability for the site to the Council. In addition, the Council will be responsible for any loss or damage to third party property that may come about as a result of the proposed improvement scheme.
- 10.4** A risk assessment form has been completed with regards to the risks involved in retaining a termination clause within the contract, whereby Network Rail could terminate the license at any point should the land be required for 'operational requirements'. The assessment has indicated that the overall risk rating is low, based on the limited circumstances in which the land would be required by Network Rail and as the financial risk will be protected as far as possible under contract.
- 10.5** The Council's Risk Manager has raised a number of concerns in relation to the contractual situation with the contractor and design consultant, the CDM requirements and the issues in relation to meeting all of Network Rail's requirements. It is considered that the risks will be mitigated through negotiations over the final construction contract and in ensuring appropriate insurance provisions are in place. It should be further noted that whilst the wording of the indemnity being sought from Network Rail is considered to be common in such contracts, it potentially extends the liability of the Council beyond the extent of normal commercial insurance protection. It is not possible to determine in advance of any incident what the additional claims costs might involve, however, the Council has required the normal insurance provision from the contractor and has risk assessed the project.
- 10.6** In addition the Council's Risk Manager has also held pre-emptive discussions with its insurers in terms of its attitude to defending "Heads of Claim" governed by the legal principle of "remoteness" and is satisfied that in the event of spurious or exaggerated claims being presented for alleged consequential losses incurred by third parties, as a consequence of their having suffered alleged property damage arising from the works, that such claims would rightly be closely scrutinised. If claims of this type when submitted are considered to be "too remote" then insurers would rightly defend the Council's position.

**10.7** The Council's Risk Manager has recommended that SBCC 6.5.1/JCT21.2.1 equivalent cover be arranged to protect the interests of both the Contractor and the Council arising from piling vibration removal or weakening of support, caused during the works.

**10.8** In addition given the high profile of the contract and the known financial risk exposure should the station/rail traffic be adversely affected as a result of an incident occurring (such as outlined above) it is noted that the Council's own H&S Co-ordinator and its Structural Engineer will independently monitor the progress of the works once the contract commences.

## **11. RECOMMENDATION**

**11.1** It is recommended that Cabinet: agrees -

- (i) to Option 1 detailed in Paragraph 4.6(i), on the basis that the proposed compensation clause, as detailed in Paragraph 4.4, be inserted into the license agreement;
- (ii) that the relevant insurance cover be arranged to protect the interests of both the contractor and the Council during the works period.

Elizabeth Morton  
Depute Chief Executive / Executive Director of Corporate Support

22 October 2009

**Implementation Officer: Alan Neish, Head of Planning & Economic Development**