

# Scarborough Waterpark

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## Introduction and scope

- 1 The former Scarborough Borough Council approved the granting of a loan of £9m to Benchmark Leisure Limited on 9 September 2013, to help finance the construction of a new Waterpark. The Waterpark was a key element of a regeneration project covering the Sands and wider North Bay area of Scarborough. The Council had identified the need to provide a 'principal visitor attraction' to support the local tourism economy and, in turn to bring growth, jobs and further investment into the area.
- 2 Construction of the Waterpark commenced in early 2015 and the venue opened to the public in July 2016. The Waterpark cost £14.4m to build with £5.4m of funding provided by Benchmark Leisure Limited. Benchmark arranged for a separate company, Alpmare UK Limited, to operate the Waterpark. Within two years of the Waterpark opening, Alpmare UK Limited experienced cashflow problems and entered into a company voluntary agreement with its creditors. From April 2019, Benchmark ceased to make regular loan repayments to the Council and the Council therefore had to take legal action to recover the outstanding debts. Benchmark Leisure Limited announced the temporary closure of the Waterpark on 12 October 2023 and the company then entered into administration on 20 October 2023. As a result of this, the lease between the Council and Benchmark for the Waterpark ended and the Council secured full possession of the site. The Council was owed approximately £7.9m by Benchmark at this time but retained ownership of the asset.

### Scope and objectives

- 3 The purpose of the audit was to undertake a fact-finding review to establish the adequacy of the decision-making process followed to approve the loan and, if possible, the reasons why the risks relating to the loan were not properly identified and mitigated. The scope of the audit was to establish:
  - the chronology of events associated with the decision to approve the loan up to the date that the Waterpark closed and Benchmark Leisure Limited entered into administration
  - the rationale for the loan, the information which was provided to councillors as part of the decision-making process
  - and the manner in which the loan was approved
  - the actions of officers and Councillors in the decision-making process
  - the adequacy of the risk identification and mitigation measures
  - any lessons learned for future regeneration projects of this nature
- 4 The work undertaken included interviews with the following people, and the review of relevant documentation held by North Yorkshire Council:
  - Lisa Dixon (former Director of Democratic and Legal Services, and Monitoring Officer at Scarborough Borough Council)

- Nick Edwards (former Director of Business Support and s151 Officer at Scarborough Borough Council)<sup>1</sup>
- Kerry Metcalfe (former Corporate Finance Manager and Deputy s151 Officer at Scarborough Borough Council)
- Carol Rehill (former Head of Legal and Governance and Deputy Monitoring Officer at Scarborough Borough Council)
- Roland Duce and Richard Moore (Benchmark Leisure Limited)
- Tom Fox (former Leader of Scarborough Borough Council)
- Councillor Eric Broadbent
- Councillor Derek Bastiman
- Councillor David Chance
- Councillor Michelle Donohue-Moncrieff
- Councillor Subash Sharma
- Councillor Janet Jefferson

Information relevant to the review was also provided by a number of residents of Scarborough.

We would like to thank everyone for their contributions in helping us to complete the review.

- 5 This report provides a summary of the findings from the review.

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<sup>1</sup> Nick Edwards was formerly the Council's Head of Finance and Asset Management and subsequently the Chief Executive.

## Findings

### Background

- 6 On 6 December 2002, Scarborough Borough Council (the Council) entered into a Development Agreement with Benchmark Teesside Limited<sup>2</sup> and a related company, Benchmark Properties Limited for the development of approximately 55 acres of land, known locally as the Sands in Scarborough's North Bay. The Council's intention was to regenerate the area and to create a tourist destination providing a range of tourist facilities, attractions and accommodation. Key features of the plan were the development of a 'principal visitor attraction' (PVA) and the provision of a multiscreen cinema. Benchmark Leisure Limited was selected as the Council's development partner following an informal tender process<sup>3</sup>. The Sands development was regarded as an important element of the Council's regeneration programme.
- 7 Benchmark Teesside Limited was responsible for the development of the site and Benchmark Properties Limited acted as the guarantor. The Development Agreement described the PVA as a day visitor attraction of sufficient size and character, open throughout the year, and with a range of facilities and features to be able to attract visitors from beyond Yorkshire. In particular, it needed to offer 10,000m<sup>2</sup> of internal space, be open every day except Christmas for at least 8 hours and include a 'state of the art' water activity park.
- 8 Benchmark Leisure Limited (company registration number 03031801) was incorporated on 10 March 1995, and established for property development and investment purposes. At the time that the Development Agreement was signed in December 2002, the company was owned by David and Janet Rhodes. The sole director of the company was David Rhodes. David Rhodes subsequently engaged a property development advisor called Roland Duce to provide support on the project. It is understood that Roland Duce was also a personal friend of David Rhodes.
- 9 Benchmark Properties Limited (company registration 03696206) was incorporated on 15 January 1999. Like Benchmark Leisure Limited, the company was owned by David and Janet Rhodes, and both of them were directors.
- 10 Ownership of Benchmark Leisure Limited and Benchmark Properties Limited changed in June 2010. Benchmark Leisure Limited was bought by BLL Investments Limited (company registration number 07168191). Roland Duce and Alex Duce were appointed as directors of the company on 18 June 2010, replacing David Rhodes. BLL Investments Limited is, in turn, owned

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<sup>2</sup> Following incorporation, the company's name was changed a number of times. It was called Benchmark Teesside Limited in the period from May 1999 to March 2003. After this date, the name reverted to Benchmark Leisure Limited.

<sup>3</sup> The process followed by the Council to award the tender was not examined as part of this review. It is understood that Benchmark Leisure Limited was not the first choice, however the successful developer withdrew because of difficulties in finding a suitable operator for the PVA.

by Abbey Commercial Investments Limited (company registration number 00442441)<sup>4</sup>. Benchmark Properties Limited was bought by Abbey Commercial Investments Limited, and Roland Duce and Brian Foord were appointed as directors of the company, replacing David Rhodes and Janet Rhodes.

- 11 The Sands site was divided into parcels of land, and Benchmark Leisure Limited was expected to complete the development in stages. In accordance with the original agreement, the company was responsible for all development costs and was not permitted to take any profit from the project until the PVA was successfully delivered. Before any work could start on each phase, the company was required to submit detailed proposals, including a development appraisal, to the Council for approval. The relevant approvals had to be granted in accordance with the Council's governance procedures. The appraisal would set out the projected cost of the development and the site value once the works were completed. The land value was set at £100k per acre or £1m for the first completed development phase<sup>5</sup>. Once each development proposal was approved, the Council would enter into a supplementary agreement with Benchmark covering the construction works. The company would then be granted a 150-year lease once the works were satisfactorily completed. The pre-agreed land value would be paid to the Council as a lease premium<sup>6</sup>. Although the original intention was for the Council to grant leases only once each phase was completed, Benchmark would often request the drawdown of part phases instead. The Council accepted this approach. A total of 18 supplementary agreements were concluded before the Development Agreement expired in March 2021 (see paragraph 20 below).
- 12 All profits arising from completed phases were to be held by the Council in a 'balance sum account' until the PVA was delivered. The 'balance sum account' was essentially an escrow account but with the funds held by the Council. Receipts and payments relating to the PVA were recorded in a separate account on the Council's ledger. The funds in the account were available to finance the construction costs of the PVA or any other development phase, subject to the Council's approval. Roland Duce understood that the balance sum account was meant to be held in a ring-fenced bank account and not recorded on the Council's financial ledger. However, this was incorrect. The first supplemental agreement, relating to the construction of seafront apartments and retail units stated that *'the Council shall retain the Balance Sum as part of its overall financial resources on behalf of the Tenant and the Council'*.
- 13 As noted above, the initial development phase (phase 1a) covered the construction of seafront apartments and retail units (Kepwick and Lockton House). This phase was expected to deliver substantial profits which would then be paid into the 'balance sum account'. The profit from this phase was calculated on an open book accounting basis. It is understood that the

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<sup>4</sup> Abbey Commercial Investments Limited has a number of other subsidiaries and is ultimately owned by Roland Duce.

<sup>5</sup> According to Roland Duce this represented a discounted land valuation.

<sup>6</sup> A non-refundable lump sum payment by the lessee.

Council engaged external accountants, BDO to certify the costs incurred and the calculation of the profit figure. The construction works were completed in July 2008, however, as a result of the economic downturn following the financial crisis in 2009, Benchmark Leisure Limited struggled to sell all the apartments and retail units, and therefore did not achieve the expected level of profit. As a result, the Council decided to take the lead with the development of the Open Air Theatre and accepted that the provision of a Waterpark only would satisfy the requirement for a PVA.

- 14 Following the change of ownership of Benchmark Leisure Limited and Benchmark Properties Limited in June 2010, negotiations took place between the new owners and the Council about the next phases of the development. The original intention had been to build up sufficient profits in the 'balance sum account' to fund the future cost of the Waterpark development<sup>7</sup>. However, Roland Duce now proposed that the Waterpark should be built as the next phase using a commercial loan to fund the construction costs<sup>8</sup>. The Council accepted this change of approach. However, by early 2013, it was apparent that Benchmark Leisure Limited had been unable to arrange the required loan. The company therefore requested a loan from the Council instead.
- 15 On 9 September 2013, the Council approved a commercial loan of up to £9m to Benchmark Leisure Limited to provide part of the funding for the construction of the Waterpark. The remaining £5m of funding would be provided by the company. The details of the proposed development and the loan arrangement were covered by a supplementary agreement, dated 25 April 2014. The arrangement involved the Council reimbursing Benchmark for the actual costs of construction up to a maximum of £9m, and the granting of a 35-year lease to the company. The loan would then effectively be repaid over the period of the lease.
- 16 Construction work commenced in early 2015 and the Waterpark was opened to the public in July 2016. Benchmark Leisure Limited arranged for a separate company, Alpmare UK Limited, to operate the Waterpark. Alpmare UK Limited was managed and part-owned by Dr Anton Hoeft. To facilitate this, Benchmark granted a sub-lease to Alpmare UK Limited. As part of the supplementary agreement with the Council, Benchmark's parent company, Abbey Commercial Investments Limited was required to provide guarantees of £1.58m, covering the lease to Benchmark and the sub-lease to Alpmare UK Limited.
- 17 Within two years of the Waterpark opening, Alpmare UK Limited experienced cashflow problems and, in January 2019, entered into a company voluntary agreement (CVA). Ownership of the company then passed to Abbey Commercial Developments Limited, and the company's

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<sup>7</sup> According to Roland Duce, the Council also agreed that future land sales (lease premiums) would be paid into the balance sum account rather than be treated as capital receipts. This is disputed by Council officers who said it was only raised by Roland Duce after the Development Agreement expired but not before. Benchmark Leisure Limited always paid the lease premiums to the Council not into the balance sum account.

<sup>8</sup> This is disputed by Roland Duce. He claims that the Council proposed the loan arrangement which he then accepted (see paragraph 26).

name was changed to North Bay Waterpark Limited on 23 June 2021. Termination of the sub-lease with Alpamare UK Limited, triggered the requirement for Abbey Commercial Investments Limited to pay a sub-lease guarantee of £580k to the Council. This was paid in April 2019.

- 18 From April 2019 onwards, Benchmark Leisure Limited ceased to make regular lease payments and the Council therefore had to commence legal proceedings in March 2021 to recover the outstanding debt.
- 19 The Sands Development Agreement originally included a longstop date of October 2008, being 5 years after the granting of outline planning permission for the site<sup>9</sup>. By this time, it was expected that Benchmark Leisure Limited would have completed all the planned phases of work. The longstop date was extended on a number of occasions<sup>10</sup>. However, by December 2020, only the following phases of the development had been completed:
- Phase 1a – seafront apartments and retail units (Kepwick and Lockton House)
  - Phase 1b – beach management centre and beach huts
  - Phase 3a – ticket office, café and miniature railway
  - Phase 3c – open air theatre<sup>11</sup>
  - Phase 4a – Waterpark
  - Phase 4b – Marston's (Tunny Catch)
  - Phase 4c – Premier Inn hotel
- 20 The Council agreed to extend the longstop date to 17 March 2021, to enable Benchmark Leisure Limited to present updated proposals for the completion of the remaining phases. At the same time, the Council commissioned KPMG to undertake a strategic review. In February 2021, the Council rejected Benchmark's proposals, and the Development Agreement therefore expired on 17 March 2021<sup>12</sup>. All Benchmark's previous rights to bring forward

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<sup>9</sup> Benchmark Leisure Limited obtained outline planning permission in October 2003.

<sup>10</sup> A supplementary agreement in 2007 had initially extended the timescale for completing the development project to 8 June 2011. The deadline was then extended again on a number of occasions. The agreement in 2007 provided the Council with greater control over the use of commercial rents from phase 1a. From this date, the rents were to be paid into the 'balance sum account' rather than be retained by Benchmark.

<sup>11</sup> In February 2009, the Council and Benchmark Leisure Limited agreed that the company's rights in respect of the Open Air Theatre (OAT) would be suspended. The refurbishment of the OAT was instead carried out by the Council itself. It is understood that the works were funded by internal borrowing. The intention was that the revenue costs would be covered by funds accrued from phase 1 and held in the balance sum account. The Council retained ownership of the site and subsequently entered into an agreement with Live Nation Entertainment Limited to operate it as a music venue. Roland Duce claimed that Benchmark paid £4m to the Council to cover the refurbishment costs for the OAT, in return for the right to be able to draw down the land (including the adjacent Valley). He also claimed that the Council then reneged on the agreement and kept the funds. This claim is disputed by Council officers. The Director of Democratic and Legal Services (Monitoring Officer) stated that the Council elected to bring forward this part of the development to prevent stagnation on site, however Roland Duce failed to present any acceptable proposals to the Council in relation to either the Valley or the OAT. Numerous proposals were brought forward which the Council could not agree to on either legal or commercial grounds.

<sup>12</sup> Roland Duce claimed that the reason the Council refused to extend the Development Agreement was because the land values had increased and there was a belief that it would be more profitable for the Council to sell the land instead. This claim has not been substantiated.



proposals for the undeveloped parts of the Sands therefore ceased from this date and the Council retained ownership of the remaining areas of land. Benchmark Leisure Limited likewise retained its interest in the existing lease agreements. Although not quantified, it is understood that the value of the undeveloped land then held by Scarborough Borough Council and now North Yorkshire Council has increased significantly since the Development Agreement expired.

- 21 Following negotiations, a settlement agreement was reached in October 2022 with Benchmark Leisure Limited and Abbey Commercial Investments Limited which resulted in a payment of £1.773m to the Council. This sum included the remaining lease guarantee of £1m. No further loan payments were received by the Council after this date and therefore the Council commenced further legal action against Benchmark in February 2023.
- 22 As a result of local government reorganisation in North Yorkshire, Scarborough Borough Council ceased to exist on 31 March 2023. The Council's assets and liabilities, including its interest in the Waterpark and the wider Sands development, then transferred to North Yorkshire Council.
- 23 Benchmark Leisure Limited announced the temporary closure of the Waterpark on 12 October 2023. MHA MacIntyre Hudson LLP was appointed as Benchmark's administrators on 20 October 2023 and the company ceased trading. The company's lease of the Waterpark was also forfeited.
- 24 North Yorkshire Council took full possession of the Waterpark site on 20 December 2023.

### **The Waterpark development**

- 25 As noted in paragraph 10 above, Benchmark Leisure Limited was bought by BLL Investments Limited in June 2010. The company then refocused its development plans on completing the construction of the Waterpark. The Council had already accepted that the refurbishment of the Open Air Theatre and the delivery of the Waterpark would satisfy the requirements of the Development Agreement in respect of providing the PVA.
- 26 On 24 March 2011, Full Council considered a report on 'The Sands'. The report was a joint report of the Strategic Director, David Archer, the Head of Finance and Asset Management and the Head of Legal and Support Services. The report explained that the previous developer, David Rhodes, had intended to build up surpluses in the 'balance sum account' from the more commercial phases of the development plan and to use those surpluses to fund the construction of the PVA. Following negotiations with Council officers, the new owner of Benchmark Leisure Limited, Roland Duce had instead proposed funding the construction of the Waterpark upfront<sup>13</sup>. The Waterpark would therefore be the next phase of development and would be delivered earlier than originally planned. The report also explained

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<sup>13</sup> Roland Duce claimed that the decision to build the Waterpark first before the more profitable phases of the Sands Development was not actually his idea but was instead promoted by Councillor Derek Bastiman (the Council's deputy leader). This claim has not been substantiated.



that Benchmark intended to appoint Alpamare to operate the Waterpark once it was built. Full Council agreed the recommendation to authorise officers to conclude the negotiations with Benchmark Leisure Limited and Benchmark Property Limited, and for the Leader to be granted delegated authority to agree an extension of the current Development Agreement. Full Council also approved a revised 'Sands Masterplan'.

- 27 Roland Duce thought that the cost of the completed Waterpark would exceed its market value. However, this change of approach was acceptable because of the potential to increase the profitability of the residential development phases which would come next. He also expected the future profits from these phases to adequately cover the cost of the Waterpark.
- 28 Roland Duce initially had difficulty identifying a suitable operator for the Waterpark. Alpamare was recommended to him by someone who was involved in the preliminary design work for the Waterpark<sup>14</sup>. He also had to commit approximately £1m of funds to the project before the Council granted approval<sup>15</sup>. A further £500k had been incurred on initial design and other project related costs.
- 29 Benchmark Leisure Limited submitted a full planning application to the Council. The application covered several phases of the planned future development of the Sands site including the construction of holiday lodges, holiday homes, a pub / restaurant, and the Waterpark. There was also provision for parking, amenity areas and landscaping. The application was approved by the Council's Planning and Development Committee on 16 August 2012, subject to certain conditions which would be negotiated through a Section 106 Agreement.
- 30 On 10 September 2012, Full Council agreed to extend the Development Agreement to 31 March 2013, to enable Benchmark Leisure Limited to obtain the required funding for the next stages of the development and to satisfy the planning conditions. On 28 March 2013, the Council's Leader approved a further extension of the Development Agreement to 31 May 2013.

#### Report to Full Council – 13 May 2013

- 31 Benchmark Leisure Limited was reported to be unable to raise the external finance required to fund the estimated £14m build costs of the Waterpark. Roland Duce stated that this was because he had originally expected Alpamare UK Limited's parent company, Alpamare Europe Limited to provide a guarantee to Benchmark Leisure Limited in respect of the sub-lease granted to Alpamare UK Limited. With this guarantee, Benchmark would then have been in a position to obtain a bank loan of £9.5m from Lloyds Bank plc. However, Max Anton Hoefer (Anton Hoefer's father and the founder of Alpamare) apparently refused to provide the guarantee.

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<sup>14</sup> Roland Duce apparently went to Germany to meet Anton Hoefer. The Alpamare waterpark was in the Bavarian Alps and according to Roland Duce matched his vision for Scarborough. The waterpark had heated swimming pools, allowing guests to swim outside in all weathers.

<sup>15</sup> For example, there was apparently a 2-year lead in time for the supply of the slides and pumps, and deposits were required when the orders were placed.

- 32 Benchmark Leisure Limited then approached the Council to discuss alternative funding options. A number of meetings took place between Roland Duce and the Council's project board<sup>16</sup>. Roland Duce initially suggested that once the Waterpark was constructed, the Council should take on the head lease to operate the site<sup>17</sup>. The Council could then enter into a sub-lease with Alpamare UK Limited. According to Roland Duce this proposal was initially accepted by the Council. However, the Director of Democratic and Legal Services (Monitoring Officer) questioned the terms of the proposed head lease and insisted that the Council should have the right to terminate the lease in the event that Alpamare UK Limited defaulted on the sub-lease<sup>18</sup>. This effectively transferred the risk back to Benchmark and therefore meant the company could no longer provide the required security to Lloyds Bank. An email from the Strategic Director, David Archer to Councillors Tom Fox and David Bastiman (dated 10 December 2012) and copied to the Chief Executive, the Director of Democratic and Legal Services (Monitoring Officer) and the Director of Business Support (s151 Officer) said *'Lisa has now had chance to review the terms of the draft lease between Alpamare UK and Benchmark. You will recall that at our last project board Roland.....proposed that the Council should take a lease from Benchmark and then grant Alpamare an underlease as the Council's tenant. Under the terms of the draft lease this would mean that the Council would become responsible for guaranteeing Alpamare's rent (£580k pa) for the full term of the 35 years lease, in effect transferring the full financial risk for default by Alpamare to the Council. Without a break clause in the lease between the Council and Benchmark protecting the Council's position in the event of default, the Council would remain liable for the full rent for the full duration of the lease. There is a fundamental issue here. Alpamare UK is a shell company and under the terms of the lease its financial guarantee is we understand limited to 1 million Euros. Lisa has spoken to.....Benchmark's solicitor about the possibility of a break clause. Roland responded to this request to say that this was not acceptable to the bank..... To help clarify matters, I spoke to Roland this lunchtime with Lisa in attendance. Whilst I made it clear that I cannot speak for the Council, I have let Roland know that this proposition would be extremely difficult to sell to the Council. I also know that Nick would not be comfortable recommending this in his role*

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<sup>16</sup> The membership of the project board included the Leader (Councillor Tom Fox), the Deputy Leader (Councillor Derek Bastiman), the Chief Executive (Jim Dillon), Hilary Jones (Strategic Director), David Archer (Strategic Director), the Head of Legal and Support Services and the Head of Finance and Asset Management.

<sup>17</sup> The proposal would have involved Benchmark Leisure Limited owning the site but leasing the site to the Council. The annual lease payments would have been £400k. The guaranteed lease payments from the Council would then have provided the security required for the loan that Benchmark Leisure Limited had arranged to construct the Waterpark. Once the Waterpark was constructed, Benchmark would have been granted a 150-year lease for the site and would then have been able to complete the wider Sands development and take all the profits. The Council would have granted a sub-lease to Alpamare UK Limited for £550k pa, but all the future operating risks associated with the Waterpark itself would have been effectively transferred to the Council. The Council would also have had to continue to pay £400k rent to Benchmark Leisure Limited or any subsequent successor in title.

<sup>18</sup> The Director of Democratic and Legal Services (Monitoring Officer) stated that her background as a commercial property lawyer meant she could see that the Council would be exposed if Alpamare were to default. Her advice was accepted by the then Leader, Councillor Tom Fox and the Chief Executive, Jim Dillon.

*as Section 151 officer. Lisa also noted that there are concerns from a legal point of view in terms of possible state aid and a fundamental change to the terms of the Development Agreement, although these were not discussed with Roland. Roland responded that this arrangement should not come as a surprise as he had discussed this with yourselves previously. He did however acknowledge that he had never raised the matter with myself or other officers. I enquired as to why Abbey Commercial Investments could not provide the guarantee; he responded that they were not "financially strong enough for the bank". We obviously need to find a way through this which minimises the Council's financial risks'.*

- 33 According to Roland Duce, the Director of Business Support (s151 Officer) contacted him immediately following the intervention by the Director of Democratic and Legal Services (Monitoring Officer) and requested a meeting. The meeting was held at Roland Duce's home at Thurgarton in Leicestershire the following day. During the meeting, the Director of Business Support (s151 Officer) apparently suggested that the Council could lend £9.5m to Benchmark Leisure Limited to part-fund the construction of the Waterpark rather than the company having to borrow from Lloyds Bank. The Director of Business Support (s151 Officer) also apparently offered to charge 1.5% interest on the loan which compared favourably with the 2.8% interest payable on the proposed Lloyds Bank loan<sup>19</sup>. Roland Duce stated that he was unsure about accepting the offer because of the risks associated with operating a Waterpark. However, by this time he had committed approximately £3m of the company's funds to the project and he thought the Sands Development would still provide profits of about £15m once all the development phases were completed. He therefore accepted the offer. Roland Duce believes that the Director of Business Support (s151 Officer) proposed this arrangement because he considered it was in the Council's best interests for the Waterpark to be built and the rest of the Sands Development to be completed. These claims have not been substantiated, and the Director of Business Support (s151 Officer) categorically denies ever visiting Roland Duce's home on his own or at this time. He also denies making any offer for the Council to loan funds to Benchmark Leisure Limited to construct the Waterpark or to charge 1.5% interest on any loan<sup>20</sup>.
- 34 Senior councillors remained enthusiastic about the possibility of being able to deliver the Waterpark ahead of schedule and supported the idea of the Council providing a loan to part-fund the construction costs. The Government was also encouraging Councils more generally to adopt alternative ways to secure inward investment and to support economic regeneration. Following further discussions with officers, the request for a loan was initially considered by Full Council on 13 May 2013. The report was heard in private and it provided details of the plans for the Waterpark and the proposed funding and lease arrangements. The report explained that in addition to providing a loan, the Council would grant a 35-year lease to

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<sup>19</sup> The rate of interest payable on the Lloyds Bank loan would have been 3.1% if a sub-lease had been granted to Alpamare UK Limited.

<sup>20</sup> Councillor Tom Fox also thought that the idea of the Council lending money to Benchmark Leisure Limited was originally proposed by Roland Duce rather than by the Director of Business Support (s151 Officer).

Benchmark Leisure Limited once construction of the Waterpark was completed. Benchmark would then grant a sub-lease to Alpacare UK Limited to operate the site<sup>21</sup>. The draft supplemental agreement was also attached to the report. This set out the requirement for Benchmark to commence construction of the Waterpark by 1 February 2014 and to complete the entire Sands development by 31 December 2020.

- 35 The report also provided a breakdown of the construction and fitting out costs for the Waterpark. These totalled £14,145k, including contingencies. It was proposed that Benchmark Leisure Limited would fund the initial construction stages and the Council would provide a loan of up to £9m to the company to fund the remainder of the works. The Council would fund the loan through external borrowing. It was also proposed that Benchmark would make rental payments to the Council equivalent to 20% of the annual turnover from the Waterpark subject to agreed minimum and maximum values of £580k and £780k respectively. The rent received would be used to service the loan. In addition, it was proposed that 8% of the annual turnover from the Waterpark would be paid into an 'improvement fund' held by the Council. This would be used to fund the future replacement of equipment within the Waterpark, for example the slides, subject to the agreement of Benchmark and Alpacare UK Limited.
- 36 The report noted that Benchmark Leisure Limited would have an option to enter into a new 150-year lease for the Waterpark at any time during the remaining period of the Development Agreement subject to the loan being repaid in full<sup>22</sup>. The Council would then be placed back in the position it would have been in had it not '*become involved in facilitating the construction of the Water Park*'. In addition, Benchmark would not be permitted to take any profits from the Sands development until this lease option had been exercised. The report also noted that Benchmark would have to pay a minimum of £1.49m to the Council by 31 March 2016 regardless of the actual profits generated from the Sands development up to this point. Any such payments would be used to reduce the Council's outstanding borrowing on the Waterpark.
- 37 The report confirmed that the priority would be on repaying the outstanding borrowing on the Waterpark loan as quickly as possible in order to reduce the Council's exposure to financial risk. The report noted that the Council would continue to receive £100k per acre if Benchmark Leisure Limited undertook any further phases of the Sands development. It was therefore proposed that any capital receipts would also be used to reduce the outstanding borrowing<sup>23</sup>. In addition, the Supplemental Agreement would require Benchmark to pay over any future profits from the Sands development, and these would also be used to reduce the outstanding borrowing.

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<sup>21</sup> The report noted that the sub-lease would include a break clause after 5 years.

<sup>22</sup> The report noted that the new lease would take account of the expired term of Benchmark's existing 35-year lease. The Council would also retain the freehold of the Waterpark.

<sup>23</sup> The report noted that the value of the remaining land covered by the Sands Development Agreement was £4.756m. It is assumed that this referred to the use of future capital receipts to reduce the PWLB loan balance rather than Benchmark Leisure Limited's debt to the Council.

- 38 The report also set out a series of mitigations including guarantees totalling £1.8m provided by Abbey Commercial Investments Limited, which would cover the lease granted to Benchmark Leisure Limited and the sub-lease granted to Alpamare UK Limited<sup>24</sup>. The report also confirmed that Abbey Commercial Investments Limited would be liable for any cost overruns on the construction of the Waterpark. The report noted that a guarantee did not provide the same protection as a performance bond because it relied on the financial standing of the guarantor and the company's compliance with the terms of the agreement.
- 39 Attached to the report was also a detailed development specification prepared by Benchmark Leisure Limited. This described the features of the building, the materials to be used and the contractors and professionals who would be involved in the construction. The specification included a reference to the Spa which confirmed that it was '*not envisaged to be fitted out during this first phase of construction..... should a decision be made to fit out the Spa earlier then this will be dealt with as a change*'.
- 40 The report highlighted the potential risks, as follows:
- To facilitate the delivery of the Water Park Members are asked to consider borrowing of up to £8.99m to fund the Council's share of the construction costs. By borrowing monies for the construction of the Water Park the Council is exposing itself to a high level of risk, and this level of borrowing should be considered carefully by Members. Whilst considering this decision Members should be mindful that in the short to medium term the Council will be presented with further borrowing requirements for other high priority schemes..... The cumulative impact of all this potential borrowing, including how it will be serviced, and the impact on future year's budgets and savings proposals must be considered alongside this decision. The funding model for the Water Park is dependent on a commercial operator running the facility and the Council receiving an annual rental. These rental payments will be used to service and repay the Council's outstanding borrowing.*
- 41 The report noted that one of the key financial risks was that the Waterpark was '*not financially viable for a commercial operator to run and that the operation reverts back to the Council. The risk is not only loss of rental income to service any outstanding debt, but also the operating costs of running a Water Park. Indicative figures received from Benchmark show that based on their perceived worst case scenario (250,000 visitors) the gross operating costs for the venue would be almost £3m per annum*'. The report also noted that the agreement with Benchmark Leisure Limited would

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<sup>24</sup> Abbey Commercial Investments Limited would be required to pay £800k to the Council in the event of default by Alpamare UK Limited. The minimum annual rental payments due to the Council would however reduce from £580k to £380k if this occurred. The report also noted that Alpamare UK Limited's parent company, Alpamare Europe Limited would provide an equivalent €1m guarantee to Benchmark Leisure Limited for the first 5 years of the sub-lease.

result in the future loss of income from the Burniston Road, Northstead Upper and Lower car parks<sup>25</sup>.

- 42 A detailed risk register was attached to the report. A total of 24 individual risks were listed together with the causes, consequences and mitigations. Each risk was scored on the basis of likelihood (from A – very low to E – almost certain) and impact (from 1 – low to 5 disaster). A total of 17 risks were assessed as high priority 'red' risks, as follows:

<b>Risk</b>	<b>Risk description</b>	<b>Current risk score</b>
1	The Council does not approve the extension of the Development Agreement	B5
3	The Development Agreement is extended but the Waterpark is not delivered at all	B5
4	Failure to agree terms with the Waterpark operator	A5
5	The extension of the Development Agreement breaches European Procurement Rules	A5
6	Insufficient Council resources to re-tender the Sands Development Agreement	E5
7	Failure to agree legal terms for the extension of the Development Agreement	B5
8	The Council does not recover the money it borrowed to fund the Waterpark	B5
9	The financial guarantees are not enforceable or fulfilled if called upon	B5
11	Benchmark terminate the head lease on the Waterpark	B5
12	Operating times and charges do not meet the expectations of the Council	D4
15	Specification of the Waterpark is not delivered	B5
16	Developer takes profit out of the Sands Development before the debt is re-paid	A5
18	Development is challenged as state aid	B5
21	The Development Agreement Terms are not enforceable by the Council	B5
22	Council ends up as operator of the Waterpark	B5
23	Alpamare are an unknown quantity to the Council	E2/3
24	Council is at Financial Risk	E5

<sup>25</sup> The average annual income over the previous 3 years from these car parks was £189.6k. The Director of Business Support (s151 Officer) also noted in discussions with the Leader and Councillor Siddons that the Council's financial exposure was however limited because the value of the undeveloped parts of the Sands exceeded the value of the proposed loan. If Benchmark Leisure Limited defaulted on the loan then the company would lose its right to draw down the remaining land.



See paragraph 109 below for further details about the potential risks.

- 43 In addition, the report detailed the latest credit agency ratings for the various companies owned by Roland Duce and for Alpmare UK Limited. At the time of the report, the latest accounts for Abbey Commercial Investments Limited and Benchmark Properties Limited had not been filed at Companies House and were overdue<sup>26</sup>. Both companies were therefore assessed as having a poor credit rating. The draft group accounts for Abbey Commercial Investments Limited for the year ended 25 March 2012 showed a profit of £1.5m and net assets of £15.2m although the auditors had noted that the valuation of investment properties did not comply with current accounting standards. The auditors had not quantified the impact of this non-compliance. The report noted that the accounts included the trading results of Abbey Commercial Investments Limited, Benchmark Properties Limited and Benchmark Leisure Limited as well as various other subsidiaries. Alpmare UK Limited had only been incorporated on 1 November 2011 and had not filed any accounts. There were therefore no credit ratings available for the company.
- 44 Members were provided with three options:
- **Option A (to accept)** – to extend the Development Agreement and to approve the funding and construction of the Waterpark on the terms detailed in the report.
  - **Option B (to defer)** – to agree in principle to the extension of the Development Agreement, funding and construction of the Waterpark as proposed, and to agree to extend the Development Agreement until 30 September 2013 to enable those proposals to be further developed.
  - **Option C (to reject)** – to not agree to the extension of the Development Agreement, funding and construction of the Water Park on the terms detailed in the report and to therefore allow the Development Agreement to lapse.
- 45 Prior to the report being considered by Full Council, members were given the opportunity to attend a briefing session. During the meeting itself the Leader, Councillor Tom Fox<sup>27</sup> proposed a fourth option, Option D which was accepted. This option effectively delayed the decision and was intended to give the Council more time to consider the proposal, obtain specialist advice and undertake further due diligence. It was also agreed to extend the Development Agreement until 30 September 2013.
- 46 Following the decision of Full Council on 13 May 2013 to delay consideration of the proposal, officers held further meetings with Roland Duce. Officers also obtained legal advice on the risk that the proposal, if approved, might breach EU state aid and procurement rules. In addition, external advice was obtained regarding the taxation and accounting aspects of the proposal. Roland Duce also held two workshops with councillors in early September to discuss the proposal.

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<sup>26</sup> There was no mention of Benchmark Leisure Limited.

<sup>27</sup> Councillor Tom Fox was Leader of the Council from September 2006 to May 2015.



Report to Full Council – 9 September 2013

- 47 A second report was presented to Full Council on 9 September 2013. The report was heard in private and provided details of the proposed loan to Benchmark Leisure Limited and the terms of the draft supplemental agreement. The report was presented by the Director of Business Support (s151 Officer). Attached to the report were a number of appendices including a detailed risk register, copies of revised heads of terms, the sub-lease and the supplemental agreement, a number of financial appraisal reports and details of the external professional advice which had been obtained.
- 48 The report noted that Benchmark Leisure Limited had presented a revised offer to the Council following the meeting of Full Council held on 13 May 2013. This had resulted in a number of changes to the proposed agreement, as follows:

Original terms	Revised terms
Alpamare Europe Limited to provide a €1m guarantee to Benchmark Leisure Limited for the first 5 years of the sub-lease.	Alpamare Europe Limited to instead provide a bank bond equivalent to 1 year's rental payments (minimum - £580k)
In the event of default by Alpamare UK Limited, Abbey Commercial Developments Limited to pay a guarantee of £800k to the Council. The minimum rent due to the Council from Benchmark Leisure Limited would however then reduce from £580k to £380k per annum.	In the event of default by Alpamare UK Limited, Abbey Commercial Developments Limited to pay a guarantee of £580k to the Council. The minimum rent due from Benchmark Leisure Limited would however then reduce to £400k per annum (rather than £380k) <sup>28</sup> .
Benchmark Leisure Limited to pay a minimum of £1.49m in profits to the Council, generated from future phases of the Sands development (by 31 March 2016). The Council to use the funds <i>'to offset its outstanding borrowing against the Water Park'</i> .	Benchmark Leisure Limited to use future profits and income streams to fund the next phases of the Sands Development with any excess being used to <i>'fund its £5m up front investment into the Water Park'</i> . However, the Council would have first call on any future profits arising from the development of both the former Atlantis and Bay View (former Marvels) sites <i>'in order to reduce any remaining outstanding Council borrowing on the Water Park'</i> .
The annual rental payments due to the Council to be equivalent to	Benchmark Leisure Limited to retain any rental income received

<sup>28</sup> The report incorrectly stated that the minimum rental payment was previously £350k.

Original terms	Revised terms
20% of the turnover from the Waterpark subject to agreed minimum and maximum values of £580k and £780k respectively.	from Alpamare UK Limited above the minimum threshold of £580k <sup>29</sup> . (see paragraph 61 below for a further change to the annual rent).
The Waterpark to open to the public by Easter 2015.	The Waterpark to open to the public by July 2015.
Benchmark Leisure Limited to be able to 'buy back' the Waterpark within a period of 10 years <sup>30</sup> .	Benchmark Leisure Limited to be able to 'buy back' the Waterpark within a period of 15 years.

- 49 As advised by the Council's external legal advisors, Eversheds LLP, the draft supplemental agreement stated that the loan to Benchmark Leisure Limited would be charged at a commercial rate of interest to minimise the risk of challenge<sup>31</sup> and the construction works would be subject to a full tender process undertaken in accordance with EU procurement rules. In addition, the report stated that *'in order to mitigate against any consequent risk, officers have constructed the draft Supplemental Agreement so that the proposed loan facility from the Council to Benchmark is a temporary measure only, with the main objective being to place both parties back in the position as originally envisaged by the Development Agreement'*.
- 50 The report also included the results of the latest due diligence checks completed by the Council into the financial standing of Abbey Commercial Investments Limited and the other group companies, Benchmark Properties Limited and Benchmark Leisure Limited, and Alpamare UK Limited.
- 51 The latest credit rating provided by Experian assessed Abbey Commercial Investments Limited as *'a low risk company; no reason to doubt credit transactions to the limit assigned'*. The improvement in the credit rating was due to the company having now submitted its accounts for the year ended 25 March 2012. Experian recommend allowing a maximum credit limit of £230k for the company. Given the credit rating, officers confirmed that further assurances would be sought from the company about the proposed £1m guarantee.
- 52 Similarly, Experian assessed Benchmark Properties Limited as *'a low risk company; no reason to doubt credit transactions to the limit assigned'*. The

<sup>29</sup> This proposed change effectively reduced the loan repayments due to the Council by up to £200k pa.

<sup>30</sup> This clause in the Supplemental Agreement was specifically intended to incentivise Benchmark Leisure Limited to repay the loan early and to return the Council to the position envisaged in the Development Agreement.

<sup>31</sup> As noted in paragraph 33, the Council was originally going to charge 1.5% annual interest on the loan (subject to future changes in the bank interest rate). Roland Duce disputed the proposed increase to the interest rate. He claimed that Councillor Derek Bastiman agreed that the interest rate could be reduced if the higher rate was shown to be unnecessary. He also claimed that the Director of Business Support (s151 Officer) stated that the Council could revisit the interest rate if Benchmark Leisure Limited repaid the loan early. We have seen no evidence to substantiate either claim.

improvement in the credit rating was also due to the company having now submitted its accounts which had been overdue. Experian recommend allowing a maximum credit limit of £120k for the company. However, the report also noted that the company was taking on average nearly 8 months to pay its invoices and suggested this might be due to cash-flow problems.

- 53 The report noted that the Council had initially undertaken a financial appraisal of Benchmark Leisure Limited in April 2013 which had concluded that it was '*a maximum risk company; all credit transactions should be referred to the parent company*'. The latest credit rating, based on the audited accounts for the period 25 March 2012, showed that the assessment had not changed, and the company was therefore '*deemed to be very high risk and has a number of characteristics resembling those displayed by failed companies. Parental or Director guarantees would be recommended if transacting with this company*'.
- 54 Alpmare UK Limited (company registration number 07831380) was similarly assessed as a 'maximum risk company; all credit transactions should be supported by a director's guarantee' due to the fact it had not filed any accounts. The credit rating report, dated 19 August 2013, also noted that the company had not yet appointed a director and Companies House had published an intention to dissolve it<sup>32</sup>. No details of the financial position of Alpmare Europe Limited were given.
- 55 The report noted a number of other issues including the fact that differing advice had been received by the Council on the accounting treatment of the lease premiums and that Roland Duce had tried unsuccessfully to obtain a viability appraisal report for the Waterpark. The report also confirmed that further work was required to confirm the cost estimates.
- 56 In the absence of a third-party viability appraisal report, officers instead undertook sensitivity analysis on the Waterpark operating forecasts prepared by Benchmark Leisure Limited. In particular, officers attempted to quantify the likely impact of actual visitor numbers being lower than expected.
- 57 An updated risk register was attached to the report. In addition, the report highlighted the following:

*The Revised Heads of Terms alter the position as regards State Aid and EU procurement rules. The focus of the previous transaction was to put the parties back in the position they would be in by the terms of the Development Agreement; the loan from the Council being only a temporary facility. The revised Heads of Terms now extend Benchmark's option on the Water Park from 10 years to 15 years making it a less commercial arrangement. The revised proposal permits Benchmark to profit both from rent overage and future phases with the focus shifting from prioritising repayment of the Council's loan, devised as an interim measure only, to*

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<sup>32</sup> The notice of intention to dissolve the company was dated 2 July 2013. The company was subsequently dissolved on 15 October 2013. A new company called Alpmare UK Limited (company registration number 08961268) was then incorporated on 26 March 2014.

*allowing Benchmark to first obtain development and rental profits to repay its Water Park investment. The risk has therefore increased in terms of both State Aid and EU procurement challenge.*

58 Members were provided with two options:

- **Option A (to accept)** – agree to the proposal set out in the Revised Heads of Terms (Appendix A) for funding the construction of the Waterpark.
- **Option B (to reject)** – to reject the proposal.

59 A further set of sub-recommendations were given for each option. For **Option A (to accept)**, these were to:

- i) Extend the Development Agreement to 31 March 2014 for the commencement of the Water Park construction*
- ii) During this intervening period instruct Officers to conclude the following negotiations:*
  - a. Agree the terms of the Supplemental Agreement between the Council and Benchmark*
  - b. Agree the terms of the Head Lease and Under-Lease*
  - c. Confirm the level and terms of the financial guarantees*
  - d. Finalise the State Aid and procurement legal position, together with any appropriate mitigation*
  - e. Agree milestones for the staged delivery of the next phases of the development, and incorporate these milestones within the Supplemental Agreement*
  - f. Carry out further due diligence on the estimated construction costs for the Water Park*
  - g. Benchmark to carry out an external financial viability assessment and financial sensitivity model for operating the Water Park*
- iii) On satisfactory conclusion of the recommendations (i) and (ii) above delegate authority to the Leader to agree that the Council enters into the Supplemental Agreement and all other relevant agreements with Benchmark in relation to the construction of the Water Park*
- iv) Note that Benchmark are likely to seek approval from the Council to draw down the next phases of the Sands Development (being Kinderland, Northstead Car Parks and Burniston Road Car Park) whilst the Water Park is still being constructed*
- v) Accept that to maintain momentum of the overall development, the Council may grant occupation under licence to construct these further phases (as referred to in (iv) above), however the Council will not grant a lease until the milestones (to be agreed) are achieved which will include the opening of the Water Park*
- vi) Delegate authority to the Director of Business Support to borrow up to £9.50 million to fund the Council's contribution towards the Water Park construction costs*

vii) Approve a budget of £40,000 from the Capital Contingency Reserve to fund the costs of concluding the outstanding issues as detailed in recommendation (ii) above.

- 60 The updated risk register was split between the two options being considered. For option A there were 16 risks listed, of which 12 were assessed as high priority 'red' risks. For option B there were 6 risks listed, of which 3 were assessed as high priority 'red' risks. The high priority 'red' risks were:

<b>Risk</b>	<b>Risk description</b>	<b>Current risk score</b>
	<b>Option A</b>	
4	The Development Agreement is extended but the Water Park is not delivered at all	B5
5	Failure to agree terms with the Water Park operator (Alpamare)	A5
7	Benchmark terminate the head lease on the Water Park	B5
8	The extension of the Development Agreement is successfully challenged as breaching European Procurement Rules and or State Aid (Revised Heads of Terms)	B5
9	Developer takes profit / income streams out of the Sands Development before the Council's debt on the Water Park is re-paid	E5
10	Benchmark does not buy back the Water Park	C5
11	Benchmark opts to walk away from the agreement once the next phases of development have been granted long term lease	B5/C5
12	Council ends up as operator of the Water Park	B5/C5
13	Alpamare are an unknown quantity to the Council	E2/3
14	Council is at Financial Risk	C5
15	The Council does not recover the money it borrowed to fund the Water Park (within 15 years)	C5
16	The financial guarantees are not enforceable or fulfilled if called upon	B5
	<b>Option B</b>	
19	Insufficient Council resources to drive forward the Sands development	D4
20	The PVA (Water Park) may not be delivered	D3
22	Adverse public reaction	E3

- 61 A further meeting took place on 4 September 2013 between the Council's Chief Executive, Director of Business Support (s151 Officer) and Director of

Legal and Democratic Services (Monitoring Officer), and Roland Duce. The meeting was held after the report to Full Council had been published. During the meeting, Roland Duce proposed some further changes to the supplemental agreement, as follows<sup>33</sup>:

<b>Original terms (as set out in the report to Full Council)</b>	<b>Revised terms</b>
The annual rent payable by Benchmark Leisure Limited to the Council to be £580k.	The annual rent payable by Benchmark Leisure Limited to the Council to be reduced to £400k.
Benchmark Leisure Limited to take responsibility for the Northstead Upper and Lower carparks resulting in a loss of income to the Council of approximately £150k pa.	The Council to retain control of the Northstead Upper and Lower carparks and the associated income. However, the Council would not receive the agreed land value of £100k per acre (equivalent to £278.4k). In addition, Benchmark Leisure Limited to retain the right to draw down the Northstead carparks when the 'buy back' option on the Waterpark is exercised.
The Council's ' <i>contribution to the construction costs</i> ' to be £9.5m.	The Council's ' <i>contribution to the construction costs</i> ' to be reduced to £9m.

- 62 The proposed changes to the supplemental agreement were tabled as amendments to option A. The report and subsequent debate was heard in private. There was apparently a heated debate, but the Council resolved to approve the loan to Benchmark (option A as amended). The decision was passed by one vote. Two Cabinet members voted against the motion. A copy of the private minute of the meeting is included in appendix 1. The decision itself is considered further in paragraphs 99 to 124 below.
- 63 Following the decision by Full Council, Benchmark Leisure Limited appointed Leisure Development Partners LLP to undertake an independent feasibility study of the Waterpark projections and to provide market research and analysis. The review was conducted by the senior partner, Michael Collins and partner, James Kennard. The results of the feasibility study were then subject to a further scrutiny review by commercial property specialists, GVA. Both reports were attached to a Leader's Urgent Decision report dated 25 April 2014<sup>34</sup> (see below).

<sup>33</sup> Roland Duce stated that there were regular project meetings between him and Councillors Fox and Bastiman, the Director of Business Support (s151 Officer) and others. These meetings were held weekly or fortnightly. Roland Duce stated that these changes were actually proposed by the Director of Business Support (s151 Officer). Roland Duce said '*he wanted to make the deal a bit safer for the council. He wanted to smooth out some wrinkles*'.

<sup>34</sup> An Urgent Decision was taken by the Leader on 31 March 2014, to extend the Development Agreement to 25 April 2014.



64 Negotiations also continued between the Council and Benchmark Leisure Limited about the terms of the Supplemental Agreement, particularly in respect of the financial guarantees and the interest rate on the loan. These were considered necessary to mitigate the risks relating to State Aid and EU procurement rules. A number of specific terms and issues were also discussed including:

- the Council's requirement for the sub-lease agreement with Alpmare to be completed in advance of the Supplemental Agreement being signed.
- the Council's requirement for the parent company guarantee from Abbey Commercial Investments Limited to be in the form of a bank guarantee. Alpmare Europe Limited was willing to provide a bank guarantee of £580k to Benchmark Leisure Limited in respect of the sub-lease but Abbey Commercial Investments Limited was only willing or able to offer a company guarantee. This provided less security and, according to the legal advice received by the Council, increased the risk of challenge in respect of the State Aid rules.
- the rate of interest to be applied to the loan. The external legal advice received by the Council in respect of State Aid rules confirmed that the risk of challenge could be substantially mitigated if the rate of interest was based on the state aid intervention rate set by the European Commission<sup>35</sup>.
- the length of the 'buy back' option. As noted above, the Council wanted a short 'buy back' period to incentivise Benchmark Leisure Limited to repay the loan early. Benchmark initially agreed to a 'buy back' period of 10 years but this had been extended to 15 years by the time of the report to Full Council on 9 September 2013. Subsequent negotiations had resulted in the 'buy back' period being further extended to 30 years with no obligation on Benchmark to exercise the option.
- a request from Benchmark Leisure Limited to extend the construction timetable by 6 months. This would mean the Waterpark would open by February 2016 rather than July 2015. Benchmark also proposed that the opening date could be subject to further delay if there were changes to the construction programme.
- to protect the Council's position, the Council also wanted to include a requirement for Benchmark Leisure Limited *'to repay the loan in the event that it become illegal for the Council to continue to perform its*

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<sup>35</sup> The Council would be charged the PWLB rate of interest on the loan, however this was lower than comparable commercial loan rates. The external legal advice obtained by the Council stated that the interest on the proposed loan to Benchmark Leisure Limited would need be charged at the State Aid intervention rate in accordance with European Commission guidance to mitigate any risk. The Council also needed to ensure that the other terms of the loan were commercial in nature. This was to avoid giving Benchmark Leisure Limited any commercial advantage and to mitigate the risk of the Council being challenged. As the terms of the draft supplementary agreement and lease were deemed to be commercial in nature, the legal advice concluded that the risk was therefore low. The Council then advised Roland Duce that the rate of interest had to be set at the State Aid intervention rate for the loan to be legally compliant. Roland Duce was informed of this, and the appropriate interest rate was included in the subsequent legal agreements, but the issue remained a matter of dispute between the Council and Benchmark Leisure Limited.



*obligations under the Supplemental Agreement*'. This point was rejected by Benchmark.

- the financial projections showed that the rides at the Waterpark could cost in excess of £4m. The Council had informed Benchmark Leisure Limited that *'any such procurement should, where appropriate, comply with EU procurement regulations'*. However, no action had apparently been taken by Benchmark to comply with this request.

65 Despite repeated requests, Benchmark Leisure Limited had also failed by this time to provide the Council with a copy of the draft sub-lease between Benchmark and Alpamare UK Limited. It had also become apparent that there was no agreed specification for the Waterpark between Benchmark and Alpamare UK Limited, and hence the Council understood that there were disagreements about what facilities should be available when the Waterpark opened. Benchmark expected some elements, including the Spa, to form part of a second phase of the project whereas Alpamare apparently wanted the Spa to be available when the waterpark opened. The Council was also concerned that Benchmark would not deliver all the elements included in the original planning application and as set out to Councillors when the proposal was considered by Full Council in September 2013. Council officers were also concerned about the lack of detail in respect of the specification and were therefore unsure whether the project could be delivered within budget. Benchmark's own projections suggested the likely construction costs had increased from £14.1m to £17.4m.

66 Benchmark also attempted to renegotiate the value of the loan, suggesting that the Council should provide funding equivalent to 70% of the total construction costs with the Council's exposure capped at about £9.8m (equivalent to a total build cost of £14m). This change was not accepted by the Council.

67 Benchmark Leisure Limited's original application for a newt licence had been refused by Natural England so an alternative site outside of the designated Sands Development area had to be found. A parcel of Council owned land was identified but this required a separate agreement to be prepared and a further application to be submitted to Natural England. Benchmark had also discovered that it needed to apply for a premises licence for the Waterpark site.

68 According to Roland Duce, the Council's Director of Business Support (s151 Officer) visited him at his home in Thurgarton approximately 6 months after the Full Council meeting on 9 September 2013. During the meeting with Roland Duce, the Director of Business Support (s151 Officer) apparently proposed a different approach. Instead of granting a £9m loan to Benchmark Leisure Limited, he proposed that the Council should fund the Waterpark construction costs itself and retain ownership of the asset. The Council would then grant a lease to Benchmark, for which the company would pay a lease premium of £5.5m. Benchmark could then buy the Waterpark from the Council in the future for £9m plus interest but less the value of the rental payments made. In addition, the annual rent payable by

Benchmark to the Council would increase to £440k<sup>36</sup>. If correct, this represented a material change to the original decision taken by Full Council. However, these claims have not substantiated, and the Director of Business Support (s151 Officer) categorically denies ever visiting Roland Duce's home unaccompanied or proposing any such changes to the loan agreement.

#### Urgent Report to Leader – 25 April 2014

- 69 An urgent report was considered by the Leader on 25 April 2014. The report was heard in private and provided an update on the Waterpark. The report was presented by the Director of Business Support (s151 Officer). Attached to the report were a number of appendices including an updated risk register, details of the external legal advice, plans and copies of the draft supplemental agreement, head lease and sub-lease. A copy of the independent feasibility study prepared by Leisure Development Partners LLP was also attached.
- 70 The report confirmed that:
- the terms of the Supplemental Agreement between the Council and Benchmark Leisure Limited had been agreed. However, either party could still terminate the Development Agreement if Benchmark failed to obtain a premises licence within 8 months of the Supplemental Agreement being signed. The draft Supplemental Agreement included provisions for the Council's '*loan contribution*' with the values and timings of these payments subject to approval by the Council's s151 Officer and Monitoring Officer.
  - the terms of the lease between the Council and Benchmark Leisure Limited and the sub-lease between Benchmark and Alpmare UK Limited had been agreed<sup>37</sup>.
  - the interest rate on the loan from the Council to Benchmark Leisure Limited would be set at 5.85%. This was based on the PWLB 15 year loan maturity rate at 22 April 2014<sup>38</sup>.

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<sup>36</sup> Benchmark Leisure Limited would, in turn, receive annual rental payments of £600k from Alpmare UK Limited. The value of the annual lease repayment quoted here is incorrect. The Council had agreed to a rent repayment of £400k on 4 September 2013 (see paragraph 61) and it was only increased to £440k when the Council discovered that work on the luxury spa had been delayed, and the facility would not be available when the Waterpark opened (see paragraph 84).

<sup>37</sup> Alpmare UK Limited was not legally obliged to enter into the sub-lease until practical completion of the Waterpark. This meant that there was a risk that the Waterpark would not have an operator in place when it was ready to open. The Council's Chief Executive (Jim Dillon) and the Portfolio Holder for Regeneration and Strategic Planning (Councillor Derek Bastiman) met Anton Hoefer and were '*reassured by his perceived commitment and enthusiasm towards the project*'. It is unclear where the meeting took place.

<sup>38</sup> It was noted that the Council would draw down the loan in stages as construction of the Waterpark progressed so the actual PWLB interest rate payable might be different. The calculation of the interest rate payable by Benchmark Leisure Limited is set out in paragraph 79 and includes additional elements required to comply with State Aid rules. The risk that interest rates might fluctuate was accepted. As noted previously, Roland Duce disputed this interest rate because he believed it was significantly higher than had originally been proposed. Council officers stated that he was informed of the revised interest rate on a number of occasions, was shown a copy of the external legal advice received by the Council and he signed the loan schedule which set it out.

- Alpamare UK Limited would provide the Council with a £580k bank bond which the Council could draw down if the company defaulted on the sub-lease<sup>39</sup>. Abbey Commercial Investments Limited had agreed to provide a £1m guarantee which would be payable in the event that Benchmark Leisure Limited defaulted on the head lease<sup>40</sup>. The report noted that this was contrary to the legal advice received by the Council which stated that the guarantee should be in the form of a bank bond to recognise the commercial nature of the agreement.
- the draft Supplemental Agreement included indicative milestones for the next stages of the Development Agreement. In addition, it was noted that the Council could terminate the Development Agreement if Benchmark Leisure Limited had not commenced work on at least two further phases by December 2017. The Development Agreement would extend to 2020 providing the milestones were met.
- Council officers had been unable to complete adequate due diligence on the Waterpark construction costs but were '*cautiously content*' that the project could be delivered within the overall cost estimate.
- that the land values attributable to the Waterpark site would be payable to the Council when Benchmark Leisure Limited exercised its option to buy back the Waterpark rather than when the lease was signed. The land values were subject to an inflation factor of 2% per annum<sup>41</sup>.
- profits from future phases of the Sands Development would not be used to repay the Council's '*outstanding borrowing*' but would instead be paid into the Balance Sum Account<sup>42</sup>. However, Benchmark Leisure Limited would not be permitted to withdraw any profits from the Sands Development until the '*Waterpark indebtedness*' had been fully repaid. If the Development Agreement was terminated, then any funds held in the Balance Sum Account would be retained by the Council.
- the final specification for the Waterpark had been agreed. Whilst fewer slides would be provided initially, Benchmark Leisure Limited had indicated that additional attractions would be added in the future as part of a planned reinvestment programme<sup>43</sup>.

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<sup>39</sup> This was different to previous reports which stated Alpamare Europe Limited would provide a £580k bank bond to Benchmark Leisure Limited to cover potential default. As noted above, the bond would not be provided until Alpamare UK Limited entered into the sub-lease. Abbey Commercial Investments had agreed to enter into an equivalent bank bond if Alpamare failed to.

<sup>40</sup> The report stated that the supplemental agreement now included a '*mechanism to replenish the £1m through profits and rents from future phases of the Sands Development*' should the guarantee become payable.

<sup>41</sup> The Waterpark development area was 4.805 acres and therefore the Council was otherwise entitled to receive a capital receipt of £480k.

<sup>42</sup> This was to allow Benchmark Leisure Limited to use the profits to fund the construction of future phases of the Development Agreement. The Council reserved the right to set aside £1m of any profits to provide a contingency should Abbey Commercial Investments Limited fail to honour the lease guarantee. Any profits remaining after the completion of the remaining development phases could be used to repay any outstanding Council borrowing. Once the Council's borrowing had been repaid then any remaining profits would be allocated 50:50 between the Council and Benchmark Leisure Limited less a 'Developer's' profit of 10% of the realised value of the overall project.

<sup>43</sup> Phase 1 was expected to include a wave pool, 4 slides, children's play area, the spa and an iodine infinity pool. Phase 2 would include an additional topsy turvey slide (or equivalent) and a lazy river. No date was given for the reinvestment programme, but it would be paid for from the 'improvement fund'.

- the Council would make available a parcel of open space land adjacent to the Waterpark for use as an alternate newt habitat.
- the projections provided by Benchmark Leisure Limited now suggested that the total cost of the project would be £18.9m (covering both phase 1 - £18m and phase 2 - £0.9m). This included approximately £2.2m relating to expenditure already incurred on fees and other pre-construction works. Benchmark had conducted a procurement exercise for the award of the main construction contract (estimated value - £7.7m) however Council officers had raised a number of concerns about the process followed. These had still to be resolved. Alpmare UK Limited had expressed a preference for the slides and other features within the Waterpark to be supplied by Aqua Leisure International. A single quotation for £3.9m had been received from the company to supply these elements. The final costs for the other elements of the project had not been confirmed but the Council's '*liability for the loan*' remained capped at £9m. Benchmark had offered to indemnify the Council for any non-compliance with European procurement regulations however it was questionable whether this indemnity could be enforced.

71 The findings of the independent feasibility study undertaken by Leisure Development Partners LLP (LDP) were also included in the report. The study concluded that:

- there was a need for the Waterpark to attract visits from tourists staying in Scarborough and the surrounding area as well as from people on day trips to the town. This was due to the limited market potential for visits by local residents.
- the number of potential visitors from the area close to Scarborough (living up to 60 minutes away) was limited but the number of visitors up to 2 hours' drive away was significant. However, a significant marketing budget would be required to attract these visitors.
- there was a need to reinvest in the Waterpark to ensure it remained attractive to potential visitors and attendance levels were maintained.
- the Waterpark would provide '*for a very complete offer as compared to most other UK waterparks*'.
- the selection of Alpmare as the proposed operator was beneficial due to the experience and quality of service they offered.
- the proposed adult admission price of £19.25 was affordable. This was based on an estimated average length of stay of 3.5 hours. However, if sufficient entertainment was not made available to support this length of stay then the admission price would need to be reduced.
- the average additional spend within the Waterpark was estimated to be £18.50 per person (including VAT). This was lower than Benchmark's own estimate but considered prudent. It was suggested that the estimate could be significantly exceeded if '*much improved food and beverage, retail and service are in place as compared to typical British parks*'.

- the forecasting showed that an annual attendance range of 300,000 to 400,000 visitors was achievable with a mid-case estimate of approximately 350,000 visitors. This required *'competitive pricing and strong marketing alongside an excellent offer but is grounded in the real world performance of other waterparks. We feel the mid case estimate is a solid and achievable target'*.
- the Waterpark had the potential to generate revenues *'in excess of £5.5 million initially, increasing towards £8.0 million over the first ten years'*.
- the Waterpark *'has the operating potential to meet its rental obligations and reinvestment plans with a surplus and that it presents a business case with a high likelihood of viability'*.

The LDP study itself stated that *'the revenue projections are highly reliant on a well presented and exciting visitor experience, compelling slides and play features, and strong marketing to drive visitation. One of the most critical success factors for this project is the fact that most potential visitors live outside the one hour drive-time and therefore marketing and making the presence of the park known beyond one hour, is extremely important. Similarly important, we view the reinvestment as critical to maintaining attendance as the resident market will require new reasons to revisit and the tourist market has many repeat guests who will behave much like residents, having already been to the waterpark on prior stays.....While sensitivity analysis lies beyond our scope we have reviewed simple sensitivity to decreased attendance and revenues and there is a significant buffer in the forecasts before the facility would be unable to meet its obligations in terms of rent and reinvestment reserve'*.

- 72 As noted in paragraph 63 above, the LDP feasibility study was subject to a further review by commercial property specialists, GVA. The report to the Leader included the following statement from GVA:

*Following the methodology of LDP for projecting the visitor numbers, the penetration rates used appear significantly higher than the comparator examples given. The revenues computed on this basis might be optimistic. There is no risk or sensitivity analyses – which we were advised was out-with the LDP remit.*

The GVA report itself stated that *'the methodology for the LDP Feasibility Study is quite generalised in a number of aspects; however, LDP stressed that they have relied heavily on their significant industry experience and adopted approaches that satisfy common practice in the Water Park industry.*

#### Financial projections

*Arithmetically the LDP projections compute correctly. However, the technique of basing them substantially on ratios to revenues makes it extremely difficult to prepare sensitivity analyses. The projections appear to be very "straight-line" (on the basis that new product investment will maintain numbers) there are however other future market factors that may impact revenues particularly for projections extended over 13 years. Furthermore, seasonality visitor patterns, although indicated, have not*



*been presented – there may be considerable peaks and troughs that could have operating and design implications.*

### Markets

*The analysis is lacking in several aspects. LDP state that the "primary (resident) market is small". Annual growth is projected to be 0.8% annually but it is not clear if this has been applied to the projections. At our meeting we were assured by LDP that this growth has been applied. There is no useful segmentation of the resident populations by: age – socio economic – or behavioural characteristics for example. Consequently, there is no segmentation basis for the projections. LDP has now provided additional general narrative. The statements about resident market characteristics begs much more thorough analysis than LDP has provided. The socio-economic map shows that the residents in the key catchment have low incomes – it is not clear how the LDP statements about income impacts on pricing have actually been applied. Resident population in the primary catchment is about 6% - there is a high dependence upon the Scarborough project being competitive over a wide area. This is a factor acknowledged by LDP and addressed by adopting a significant marketing budget.*

### Penetration Rates Used for the Projection.

*Whilst the comparator analyses are useful as a context they appear to be largely from overseas. The projections use penetration rates that are considerably higher than the "averages" presented; this is particularly noticeable in the Primary Residents and Tourist categories. There is no rationale given.*

- 73 The report to the Leader noted that a members' sub-group had been established to consider the findings of the LDP feasibility study and the review by GVA. The sub-group consisted of Councillors Bastiman, Cross, N Murphy, Popple, and Siddons. The councillors attended presentations by both LDP and GVA and received copies of their reports. Councillor Bastiman and the Chief Executive, Jim Dillon also had a separate meeting with LDP and GVA. The outcome of this meeting, together with the reports produced by both LDP and GVA, were presented to the members' sub-group on 23 and 24 April 2014. Councillors Siddons, Popple, Murphy and Bastiman apparently indicated their support for the project based on the projections provided by LDP<sup>44</sup>. However, the report to the Leader did not address the obvious concerns raised by GVA despite their relevance to the decision.
- 74 The report to the Leader also noted that the Council's external legal advisors had warned that there was still a risk that the agreement could be challenged as being in breach of EU State aid rules and relevant procurement legislation. It was noted that *'whilst the Council has taken various steps in the documentation to add to the commerciality of the deal, due to the unusual nature of the transaction, it is difficult to be confident that the transaction could not be challenged as truly commercial.'*

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<sup>44</sup> The Leader, Councillor Tom Fox confirmed that he did not take part in these meetings. He recognised that as the decision-maker he did not want to influence the outcome of the discussions.

75 An updated risk register was attached to the report. The key risks were summarised as follows:

- the Council could be challenged in relation to State Aid and procurement regulations.
- Alpmare might not enter into the sub-lease with Benchmark Leisure Limited resulting in the possible lack of a suitable operator.
- Benchmark might breach the terms of their lease and not pay the annual rental to the Council.
- Benchmark might fail to provide funding for any cost overruns on the construction of the Waterpark.
- Benchmark might fail to obtain a premises and/or new licence in a timely manner resulting in the construction of the Waterpark being delayed or the Supplemental Agreement being terminated.

76 Finally, the report included the planned construction timetable for the Waterpark, as follows:

Work to commence on site	30 September 2014
Practical completion of the works	30 November 2015
Opening date	25 March 2016
Longstop date (in respect of the Development Agreement)	31 December 2017

77 The Leader was recommended to either:

- *Exercise the authority delegated by Full Council on 9 September 2013 and authorise the Council to enter into the revised Supplemental Agreement with Benchmark and all associated requisite agreements to permit the Waterpark phase of the development to proceed: or*
- *Not exercise the authority delegated by Full Council on 9 September 2013 and not authorise the Council to enter into the revised Supplemental Agreement and associated agreements with Benchmark.*

There were a series of sub-recommendations relating to each option. The Leader (Councillor Tom Fox) decided that the Council should enter into the revised Supplemental Agreement.

78 The supplementary agreement was then finalised and signed on 25 April 2014. The agreement was structured so that Benchmark provided the initial £5m of funding and the loan from the Council was then used to fund the final stages of the build costs. The loan itself being drawn down in stages as the work progressed. The company also accepted the full risk of any potential cost overruns arising from the building work.

79 As noted in paragraph 49 above, the Council was required to charge a commercial rate of interest of 5.85% on the loan to Benchmark Leisure



Limited to comply with the European Union (EU) state aid rules and Benchmark Leisure Limited had to follow a full procurement process to award the construction contract. The rate of interest was fixed for the duration of the loan. The supplementary agreement detailed the calculation of the interest rate on the loan to Benchmark, as follows:

PWLB loan rate (15-year loan)	4.17%
Scarborough Borough Council certainty rate <sup>45</sup>	-0.20%
European Commission reference / discount rate <sup>46</sup>	0.88%
Risk margin (EC determined)	1.00%
	<hr/>
	5.85%
	<hr/>

- 80 In accordance with the Development Agreement, Benchmark Leisure Limited would have been entitled to enter into a 150-year lease for the Waterpark had it been able to fund the construction costs itself. The lease premium payable would have been calculated with reference to the agreed land value of £100k per acre.
- 81 The Council granted Benchmark a licence to occupy the land during the construction stage but retained full step-in rights should the company have defaulted at any time.
- 82 The Waterpark was built on part of the former Burnistone Road car park. The construction work commenced in early 2015 and the venue was initially scheduled to open by Easter 2016. The main contractor was Tolent Construction Limited<sup>47</sup> but other specialist contractors were involved in the work, including Booth Construction who provided the structural steelwork. The final cost of the build was £14,387,399. Due to a number of delays, the Waterpark was completed in the summer of 2016 and the venue officially opened to the public on 30 July 2016. The building included a wave pool and a number of slides, a splash and play area, and outside pools. There was also a café and outdoor bar.
- 83 Once construction of the building was completed, the Council granted a 35-year lease to Benchmark Properties Limited for the site<sup>48</sup>. The lease included part of the pay and display car park adjoining the building. The reduced term of the lease was a condition of the supplementary agreement and reflected the granting of the loan to the company.
- 84 A luxury spa was supposed to form part of the initial Waterpark development however Benchmark Leisure Limited delayed work on this part of the project. The company only informed the Council of the delay towards

<sup>45</sup> A discount granted to local authorities who provided details of local term borrowing and capital spending plans (a Certainty Rate return)

<sup>46</sup> [https://competition-policy.ec.europa.eu/state-aid/legislation/reference-discount-rates-and-recovery-interest-rates/reference-and-discount-rates\\_en](https://competition-policy.ec.europa.eu/state-aid/legislation/reference-discount-rates-and-recovery-interest-rates/reference-and-discount-rates_en)

<sup>47</sup> Tolent Construction Limited went into liquidation in February 2023, which initially put in doubt the warranties provided by the company. Collateral warranties were provided by the project sub consultants and sub-contractors to protect the Council in respect of any future latent defects.

<sup>48</sup> The lease was dated 29 July 2016.

the end of the construction programme. The spa itself was only completed and opened to the public in March 2019<sup>49</sup>.

- 85 Benchmark Leisure Limited entered into a sub-lease with Alpamare UK Limited<sup>50</sup> (company registration number 08961268), trading as Alpamare, to operate the Waterpark. The company was owned by Alpamere Europe Limited<sup>51</sup>.
- 86 The loan to Benchmark Leisure Limited was structured to be repaid within 30 years. The lease to Benchmark for the Waterpark included annual rental payments of £440k. These payments were intended to be offset against the outstanding loan balance plus accrued interest. In addition, the Council agreed to offset £140k of annual parking income received from the Northstead Upper and Lower car parks against the outstanding loan. In return, Benchmark agreed to forego the right to bring forward any development plans for the car parks whilst the loan remained outstanding. It was expected that the loan would be fully repaid by 21 March 2043<sup>52</sup>.
- 87 As part of the supplementary agreement, Benchmark Leisure Limited's parent company, Abbey Commercial Investments Limited was also required to provide a guarantee of £1.58m in respect of the Waterpark lease. The guarantee was in two parts. The first part was for £1m and related to the head lease with Benchmark Leisure Limited. This would be payable if the company defaulted on the terms of the lease<sup>53</sup>. The second part was for £580k and related to the sub-lease awarded to Alpamare UK Limited. This would be payable by Benchmark if Alpamare UK Limited defaulted. As noted above, Alpamare UK Limited provided a bank bond as security for this guarantee.

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<sup>49</sup> The Council increased the annual rent payable by Benchmark Leisure Limited from £400k to £440k because the spa was not ready. The Head of Legal and Governance (Deputy Monitoring Officer) also stated that the guarantee provided by Abbey Commercial Investments Limited was increased by a further £600k, equivalent to the cost of fitting out the spa (the total guarantee was therefore set at £1,180k whilst work on the spa was continuing). Benchmark Leisure Limited also committed to delivering the completed spa by December 2016 and was not permitted to take forward any further phases of the Development Agreement until the works were completed.

<sup>50</sup> The company entered into a corporate voluntary agreement (CVA) on 21 January 2019 and changed its name to North Bay Water Park Limited in June 2021. The CVA was concluded on 16 March 2022.

<sup>51</sup> Alpamere Europe Limited held 51% of the ordinary shares in Alpamare UK Limited. The remaining 49% of the shares were held by Dr Anton Hoefer until 9 July 2019. At the time, Alpamare Europe Limited was 100% owned by Tampri Property Holding Inc, a company registered in the British Virgin Islands. Alpamare Europe Limited was bought by Roland Duce on 15 August 2019 and Dr Anton Hoefer ceased to be a director of the company on 17 September 2019. Ownership of the company transferred to Mark Hughson on 1 February 2021, and then to Roland Duce on 1 January 2022 and then to Abbey Commercial Investments Limited on 9 May 2022. Ownership of the company has recently reverted to Mark Hughson (on 14 April 2023). Mark Hughson has a number of business links with Roland Duce.

<sup>52</sup> Roland Duce claimed that the Council also agreed to offset the rents received from the tenants of the Valley and the Beach Management Centre and the £4m Benchmark Leisure Limited had apparently paid to the Council to reimburse the costs of the Open Air Theatre refurbishment. This claim has not been substantiated and the details are not set out in any legal agreements.

<sup>53</sup> Benchmark Properties Limited provided an unlimited guarantee in the event that Benchmark Leisure Limited defaulted. If any rent was unpaid after 14 days, the Council had the option to enforce this guarantee or exercise its right to forfeiture of the lease. In the event of the lease being forfeited, Benchmark Properties Limited and Abbey Commercial Investments Limited had the right to first settle the debt and replace Benchmark Leisure Limited as the tenant.

- 88 In addition to the parent company guarantee, Benchmark Leisure Limited was not permitted to take a profit from any other phase of the Sands development until the loan was fully repaid. However, the company had the right to enter into a new 150-year lease for the Waterpark during the first 30 years of the lease, providing the loan was fully repaid.
- 89 The lease between the Council and Benchmark Leisure Limited included a condition for the tenant to pay a sum equivalent to 8% of the annual turnover of the Waterpark, and the adjoining car park, into an 'improvement fund' held by the Council. The 'improvement fund' was to be used to upgrade the facilities with the aim of increasing visitor numbers. As noted in paragraph 84 above, the provision of the luxury spa was delayed. Following a request from Benchmark, the Council agreed that for a period of 5 years, 80% of the improvement funds could be used to fit out the spa. The decision was approved by the Council's Cabinet.

### **Alpamare UK Limited**

- 90 Within two years of the Waterpark opening, Alpamare UK Limited experienced cashflow problems and was unable to pay HMRC and a number of its suppliers. On 15 August 2018, the company's main creditor, British Gas commenced the process to have the company wound up<sup>54</sup>. In turn, Alpamare petitioned for and secured a company voluntary agreement (CVA) on 21 January 2019<sup>55</sup>. Benchmark Leisure Limited apparently notified the Council that it had terminated the sub-lease with Alpamare UK Limited and taken over the management of the Waterpark. This was to ensure that the Waterpark was able to continue to operate. The termination of the sub-lease triggered the requirement for Abbey Commercial Investments Limited to pay the sub-lease guarantee of £580k to the Council.
- 91 Anton Hoefer apparently blamed the company's financial difficulties on a number of factors including the delayed opening of the Waterpark itself, visitor numbers being lower than expected due to the delayed opening of the Spa facility, energy costs being higher than budgeted and the rent being set too high. Whilst visitor numbers during the summer were generally in line with projections, the Waterpark had attracted far fewer visitors during the winter months compared to similar venues in Europe. The average revenue spend per head was also significantly lower than expected<sup>56</sup>.
- 92 Anton Hoefer also stated that the Waterpark experienced a number of technical problems in its first few months of operation which resulted in

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<sup>54</sup> British Gas was owed £702,244 by Alpamare UK Limited and the winding-up petition was scheduled to be heard at the Royal Courts of Justice on 23 January 2019.

<sup>55</sup> As well as the debts to British Gas and HMRC, the CVA showed that Alpamare UK Limited also owed Scarborough Borough Council £107,629. The CVA was concluded on 16 March 2022 and the administrators were able to pay 16.71p in the £ to the creditors. Roland Duce claimed that Alpamare UK Limited also owed Benchmark Leisure Limited £2m but this claim has not been substantiated.

<sup>56</sup> Anton Hoefer is reported to have said that '*Scarborough is completely empty during the winter months, there are hardly any day trippers to the coast, and the visitor potential from locals has proven to be limited. The revenue per head is significantly lower than in other markets. The guests in Alpamare Scarborough consume significantly less than expected*'.

excessive energy consumption and water loss. The water treatment and heating system broke down and Benchmark Leisure Limited did not install a building management system (BMS) when the Waterpark was built meaning the boilers were not operating efficiently<sup>57</sup>. In addition, Benchmark failed to arrange a commercial gas supply contract with British Gas meaning the gas supplied during the first year was charged on the basis of a domestic tariff rate rather than a lower wholesale tariff.

- 93 Benchmark Leisure Limited delayed payment of the sub-lease guarantee until April 2019. In addition, the company failed to obtain approval from the Council for any new sub-lease arrangements and did not provide a copy of the sub-lease to the Council despite repeated requests. The exact operating arrangements for the Waterpark were therefore unclear from this time onwards. The accounts of Alpmare UK Limited for the year ended 29 February 2020 and for subsequent years show that the company continued to employ the staff at the Waterpark. Another company, Monkey Business Play Limited was appointed to provide management and support services and in July 2019, most of the shares held by Anton Hoefer were transferred to Alpmare Europe Limited<sup>58</sup>. Anton Hoefer ceased to be a director of Alpmare UK Limited on 17 September 2019 and the company's name was changed to North Bay Waterpark Limited on 23 June 2021. Roland Duce claimed that Alpmare UK Limited continued to be the sub-tenants once the company voluntary agreement (CVA) was concluded.

### **Marston's pub/restaurant and the Premier Inn**

- 94 Construction of the Marston's pub and restaurant (Tunny Catch) was completed in October 2016. The work was undertaken and funded by Marston's rather than Benchmark Leisure Limited. As a result, the Council was willing to grant a lease upfront instead of a construction licence. Benchmark paid a lease premium of £44.5k (based on the agreed land value of £100k per acre). Marston's paid a sub-lease premium of £920k, which was paid into the balanced sum account. The Council agreed that these funds could be used by Benchmark to make improvements to the Burniston Road car park, although ownership of the car park would remain with the Council<sup>59</sup>.
- 95 The Council granted Benchmark Leisure Limited an operating licence to enable it to manage the Burniston Road car park alongside the Waterpark car park. The licence provided for a split of the profits between the two car parks. However, Benchmark continually failed to provide details of the car park income or the profit calculation. It also failed to pay any of the profits to the Council. The Council therefore terminated the car park operating

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<sup>57</sup> Anton Hoefer apparently claimed that the heating system breakdown resulted in the need to provide discounts and refunds to visitors, reducing the income received in the period. He also claimed that gas consumption was almost double what it should have been.

<sup>58</sup> The records on Companies House suggest that there may have been an error with filing the annual confirmation statements in 2019. The more recent confirmation statements suggest that Alpmare Europe Limited holds 90 of the ordinary shares in Alpmare UK Limited and Anton Hoefer continues to hold 10 of the ordinary shares.

<sup>59</sup> Benchmark Leisure Limited was not permitted to draw down the Burniston Road car park phase until work on the planned multiscreen cinema had commenced on site.

licence in April 2021 although in accordance with the Waterpark lease, Benchmark retained its rights to the car park adjacent to the Waterpark.

- 96 In April 2019, the Council and Benchmark Leisure Limited agreed a supplementary agreement for the construction of a 105 bedroom hotel on the site between the Waterpark and Marston's pub and restaurant<sup>60</sup>. To enable the construction work to proceed, the Council agreed to grant the lease to Benchmark Leisure Limited in advance<sup>61</sup>. The Council also agreed that the lease itself would be assigned immediately to Scarborough Water Park Hotel Limited (company registration number 11176906), a company owned by Abbey Commercial Investments 2 Limited (company registration number 11862269)<sup>62</sup>. Once the construction phase was completed, Scarborough Water Park Hotel Limited granted a sub-lease to the operators of Premier Inn, Whitbread Group plc. The hotel opened in March 2021<sup>63</sup>.
- 97 Lazari Finance 2 Limited provided a loan of approximately £7m to Scarborough Water Park Hotel Limited to finance the construction of the hotel<sup>64</sup>. The loan was secured on the assets of the company. The Council registered a second charge on the hotel site to protect the Council's position having granted the lease in advance. The charge was intended to secure any future profit from the sale of the hotel site<sup>65</sup>.
- 98 Benchmark Leisure Limited paid a lease premium of £49k to the Council for the hotel site lease. The Council also required the company to pay a number of other outstanding debts before the lease was agreed<sup>66</sup>. The agreement enabled the Council to recover a number of outstanding debts from Benchmark, however the assignment of the lease to a separate company, Scarborough Water Park Hotel Limited meant that the hotel site could not be used as additional security for the Waterpark loan. The Council had taken

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<sup>60</sup> It is understood that the Council made the completion of the Waterpark Spa one of the conditions before agreeing to the construction of the hotel.

<sup>61</sup> This was required by Lazari Finance 2 Limited who provided the finance for the development.

<sup>62</sup> It is understood that this was also a requirement of Lazari Finance 2 Limited.

<sup>63</sup> The hotel was originally supposed to open in November 2020, but the opening was delayed due to the Covid-19 pandemic.

<sup>64</sup> The latest accounts for Scarborough Waterpark Hotel Limited showed the company had a loan of £6.974m with Lazari Finance 2 Limited at 30 June 2022. The loan was secured by fixed and floating charges on the assets of the company. Loan guarantees were also provided by Abbey Commercial Investments Limited and Abbey Investment Holdings Limited. The loan was due to be repaid in full on 31 December 2022, but the repayment date was extended after the accounting year-end.

<sup>65</sup> Benchmark had indicated that the site would be sold with the benefit of the Premier Inn sublease once the hotel opened. The supplementary agreement required a proportion of any profit from the sale or surplus rent to be paid into the balance sum account. The profit would be calculated on an open book basis and after Benchmark had deducted £950k to cover additional costs incurred with building and operating the Waterpark. The agreement guaranteed that the Council would receive a minimum of £1.498m from any sale proceeds. The Council could use the funds received to settle any outstanding balance on the loan. The agreement also required Benchmark to confirm that any proposed sale price was acceptable to the Council. The site has not been sold since the hotel opened and Benchmark has also failed to account for the rents received from Whitbread. North Yorkshire Council issued a statutory demand for the surplus rents in September 2023, just before Benchmark Leisure Limited went into administration.

<sup>66</sup> The council received a payment of £861,996 on 9 April 2019. This included the Alpmare sublease guarantee of £580k, a Waterpark quarterly rent payment (March 2019), the costs of certain improvements at the Waterpark and income from the Burniston Road car park.

legal advice from Pinsent Mason and this was the only arrangement that was commercially acceptable to the operators of Premier Inn, Whitbread Group plc<sup>67</sup>.

### **Decision making by the Council**

- 99 The decision to grant a loan to Benchmark Leisure Limited was undoubtedly risky. The company had reportedly failed to obtain a loan from its bankers or other sources and the due diligence checks carried out by officers had identified concerns with the company's finances. The recommended maximum credit limit for its parent company, Abbey Commercial Investments Limited was also only £230k.
- 100 However, senior councillors were keen to deliver the planned regeneration of the Sands and the wider North Bay area of Scarborough. A key element of this vision was the provision of the Waterpark or an equivalent visitor attraction. Progress with this had been slower than originally expected but Roland Duce was now offering the possibility that the Waterpark could be built without further delay. Senior councillors may also have been concerned that if the request for a loan was refused this might put the whole Sands redevelopment in jeopardy. The decision was also taken at a time when Councils were generally being encouraged to adopt a more commercial approach at a time of austerity.
- 101 The Council recognised that there was risk in granting the loan to Benchmark Leisure Limited and therefore put in place various mitigations. For example, the funds could only be drawn down in stages linked to the construction of the Waterpark, the construction costs were subject to open book accounting and the value of the construction work had to be certified by a quantity surveyor. The risk of any cost overruns was effectively underwritten by Abbey Commercial Investments Limited. Benchmark Properties Limited was also required to provide a total of £1.58m in guarantees to cover either Benchmark Leisure Limited or Alpamare UK Limited defaulting on their respective leases. In addition, Benchmark Leisure Limited was not permitted to take out any profits from the wider Sands development until the loan was repaid in full. The Council also retained the freehold interest in the Waterpark site so could take vacant possession of the site in the event of any default by the company<sup>68</sup>. At various stages, the Council obtained external legal advice from Eversheds LLP, Womble Bond Dickinson (UK) LLP and Pinsent Masons on the proposed legal agreements and associated governance measures.

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<sup>67</sup> It is a normal commercial practice to hold property assets in separate companies, particularly where those assets are being used as security for external financing. The separate structure protects the asset in the event that the 'trading' company becomes insolvent. It also makes it easier for the business owner to sell either the 'trading' company or the 'property owning' company. The overall value of the business is therefore maximised. The operators of Premier Inn also needed to protect their commercial interests in the event that Benchmark Leisure Limited defaulted on their lease or went into administration.

<sup>68</sup> The Director of Democratic and Legal Services stated that she sought external legal advice on whether the lease provisions could have been strengthened further but was assured that they were appropriate in the circumstances. For example, it was not possible to put a charge on the land because this was already owned by the Council and, in the event of default, the Council would be able to take possession of the Waterpark.



- 102 Three questions therefore need to be considered, firstly whether the risks were properly identified and evaluated, secondly whether further mitigations could have been put in place and finally whether the decision taken was itself reasonable in light of the known risks.
- 103 All the councillors interviewed at part of this review welcomed the investment in the North Bay and the redevelopment of the Open Air Theatre. There was also support for the construction of a principal visitor attraction. However, concerns started to be raised once it became known that the Council was expected to provide the substantial part of the funding for the construction of the Waterpark.
- 104 As noted in paragraph 32 above, Roland Duce initially stated that he would raise all the funding required to build the Waterpark. However, in early 2013, he approached the Council to explain that he could only provide £5m of funding and that the Council would need to provide the remaining £9m if the project was to proceed.
- 105 A number of councillors were apparently surprised by this change of approach. Prior to the Full Council meeting on 13 May 2013, Roland Duce gave a presentation to councillors on the revised proposal. According to Councillor Subash Sharma, Roland Duce arrived late for the meeting, however, he came across as confident and convincing. He talked about the £5m investment he was making but did not reference the proposed loan from the Council despite it being part of the proposal. According to Councillor Sharma, he questioned Roland Duce about this omission but was not satisfied with the response. No other councillors apparently challenged the proposal or the suitability of providing a loan to Benchmark. Councillor Sharma's view was that the Council's executive members had already decided to support the proposal and therefore there was no proper consideration or discussion about the potential risks of providing funding to Benchmark.
- 106 Councillor Eric Broadbent stated that Roland Duce initially claimed that *'people were queuing up to invest'* in the Waterpark but he then gave a presentation to the councillors where he said that to continue, he would need to make a deal with the Council. A Labour councillor, Colin Challen apparently asked *'what about the elephant in room – where will you get the rest of money?'* Once it became clear that this meant obtaining a loan from the Council, the Labour group decided not to support the proposal. Roland Duce stated that Councillor Bill Chatt was particularly vocal in his opposition to the proposal when it was considered by Full Council on 9 September 2013.
- 107 Councillor David Chance (Cabinet Member for Leisure at the time) also stated that he raised concerns about the likely risks of default by Benchmark Leisure Limited in a Cabinet meeting before the matter was considered by Full Council. His views were apparently shared by Councillor Kenyon (Cabinet Member for Finance). However, both Councillors subsequently voted in favour of the proposal.



- 108 Councillor Janet Jefferson expressed scepticism about the original proposal put forward by Roland Duce and the fact that Benchmark Leisure Limited appeared initially willing to fund the full costs of the Waterpark development upfront. This scepticism was shared by Councillor Derek Bastiman who thought it was always Roland Duce's intention to seek funding from the Council. Councillor Jefferson also questioned whether Benchmark really intended to forego all future profits from the Sands Development until the loan was repaid.
- 109 As noted in paragraph 42 above, the initial report to Full Council seeking approval of the loan to Benchmark Leisure Limited (on 13 May 2013) highlighted a significant number of 'red' risks. Whilst various mitigations were listed, the current risk score was the same as the target risk score in most cases. A number of actions to reduce these risks were also shown on the risk register but these were generally limited in nature or lacked relevance. No specific actions were listed for many of the 'red' risks. Two of the risks referenced the possibility that the Council would not be able to fully recover the loan or enforce the guarantees provided by Abbey Commercial Investments Limited (risks 8 and 9). However, the proposed actions for risk 8 were simply shown as '*implement financial monitoring*' and conduct an '*independent audit of construction costs*'. There were no actions shown for risk 9. The actual scoring of both risks could also be questioned given that the likelihood of the risks materialising was assessed as 'not likely' despite the known financial position of Abbey Commercial Investments Limited, Benchmark Properties Limited and Benchmark Leisure Limited.
- 110 The report also lacked clarity because it referred to the Council taking on additional borrowing '*to fund the Council's share of the construction costs*' rather than effectively providing a loan to Benchmark Leisure Limited. In particular, the report stated that '*if Members still have aspirations for a Water Park to be delivered under this Development Agreement then the only way will be for the Council to step in and assist as primary funder due to the developer being unable to access its own funding streams*'. The focus of the report seemed to be on the potential impact on the Council's other priorities due to the cumulative effect of borrowing rather than the risk that Benchmark might default on the loan. This emphasis on the borrowing aspects of the proposal may have resulted in insufficient consideration of the likelihood of default or that the Waterpark might not be commercially viable.
- 111 Two other factors were also not given sufficient weight in the report to Full Council (on 13 May 2013). Firstly, no explanation was provided about why the Council proposed to grant a 35-year lease to Benchmark Leisure Limited and for the loan to be repaid over nearly 30 years rather than a shorter time period. This was a significant long-term commitment which appeared to favour the company. Secondly, insufficient information was given about any contingency plans should Benchmark or Alpamare UK Limited be unable to operate the Waterpark on a commercial basis. Neither company had any track record of operating similar venues in this country and so lacked the knowledge and experience required to ensure it was a success. This was therefore a significant risk. The consequence of failure was that the

Waterpark might close or be handed back to the Council to operate. The risk that the Council might end up as the operator of the Waterpark was included in the risk register attached to the report (risk 22). The consequences were also set out, including the likelihood that any decision to continue operating the Waterpark could have a serious impact on the Council's revenue budget or the decision might need to be taken to close it. However, the proposed action in the event that the risk materialised was simply to '*market opportunity to new developer*'.

- 112 The second report to Full Council (on 9 September 2013) continued to place an emphasis on approving the borrowing of funds rather than the granting of a loan to Benchmark Leisure Limited. In particular, Councillors were asked to grant delegated '*authority to the Director of Business Support to borrow up to £9.50 million to fund the Council's contribution towards the Water Park construction costs*'.
- 113 An updated risk register was attached to the report. This still included a significant number of 'red' risks after mitigations of which four referenced the possibility that the Council would either not be able to fully recover the loan, enforce the guarantees provided by Abbey Commercial Investments Limited or might have to become the operator of the Waterpark (risks 12, 14, 15 and 16). The proposed actions were:

<b>Risk</b>	<b>Risk description</b>	<b>Action Plan</b>
12	Council ends up as operator of the Water Park	No actions listed
14	Council is at Financial Risk	Review the major projects and priorities Investment Management plan
15	The Council does not recover the money it borrowed to fund the Water Park (within 15 years)	No actions listed
16	The financial guarantees are not enforceable or fulfilled if called upon	Legal Agreements to be completed  Validate guarantees

- 114 A number of changes to the terms of the agreement with Benchmark Leisure Limited were made before the Full Council meeting on 9 September. These changes generally favoured Benchmark and resulted in the annual rental income being reduced to £400k, the guarantee in respect of the Alpmare sub-lease being reduced to £580k and the 'buy back' period for the Waterpark being extended to 15 years. Benchmark was also no longer required to pay a minimum of £1.49m in future development profits to the Council by 31 March 2016. The impact of these changes was offset by the Council retaining control of the Northstead Upper and Lower car parks and

the associated income. This effectively prevented Benchmark Leisure Limited from developing this land until the loan to the Council was repaid<sup>69</sup>.

- 115 The decision by Benchmark Leisure Limited to award a sub-lease to Alpamare UK Limited to operate the Waterpark once it was built, appears to have reassured a number of councillors and officers that the attraction could be run successfully on a commercial basis without the need for further subsidy. Alpamare was presented as an experienced and successful operator of similar water parks elsewhere in Europe<sup>70</sup>. A number of councillors including the Leader, Tom Fox also expressed confidence in Anton Hoefer's knowledge and experience having met him<sup>71</sup>.
- 116 One councillor stated that Roland Duce presented himself to the Council as a credible business partner and he had clearly persuaded both councillors and officers that his proposal was commercially viable. The councillor stated that officers spoke positively about Roland Duce following the initial discussions with him. Roland Duce also set out a vision for the Waterpark which suggested it would attract the required visitor numbers. He is reported to have said that *'while Scarborough's place in history as the first seaside resort is assured, the town had to evolve in order to attract new generations of visitors.....the new park would initially feature four world-class water rides that would be on a par with those found at attractions in Dubai and Florida'*. Given the previous delays in delivering the PVA it is perhaps easy to understand why this was initially viewed as an attractive proposition by both councillors and officers.
- 117 The business plan prepared by Benchmark Leisure Limited included projections for visitor numbers to the Waterpark which in hindsight appeared to have been overly optimistic. For example, Benchmark estimated that the venue would attract 300,000 visitors each year<sup>72</sup>. In reality, the best year for attendance was 2019 when approximately 145,000 people visited the Waterpark. At least one councillor stated that the projections lacked credibility. For example, no account appeared to have been taken of the hotels and car park spaces in the area which would be needed to accommodate the predicted visitor numbers. The existing public transport provision was also considered to be inadequate. However, as noted in paragraphs 71 and 72 above, an independent feasibility study of Benchmark's projections was carried out and this was subject to further review by the Council's appointed commercial property specialists, GVA.
- 118 Councillor Donohue-Moncrief stated that she wrote to the then Leader, Councillor Fox prior to the meeting of Full Council on 9 September 2013, to express her reservations about granting the loan to Benchmark Leisure Limited. Her view was that the Council should not be funding commercial

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<sup>69</sup> This meant the land was not developed and ultimately reverted to the Council when the Development Agreement expired in March 2021.

<sup>70</sup> The company was reported to be operating 2 similar leisure attractions, one in Germany and another in Switzerland but see paragraph 118 for further details.

<sup>71</sup> Councillor Tom Fox stated that he and the other group leaders met Roland Duce and Anton Hoefer at a hotel in London before the Full Council meeting on 9 September 2013.

<sup>72</sup> Anton Hoefer claimed that Alpamare had estimated that the Waterpark would attract approximately 210,000 visitors each year.

projects of this nature. Whilst the banks had been reluctant to provide loans following the financial crisis in 2009, she thought that it should still have been possible for Benchmark to raise the funds needed if the company could show that the project was commercially viable. Councillor Donohue-Moncrief also had concerns about the relationship between Roland Duce and Dr Anton Hoefer, and about whether Alpamare was a suitable partner. She did not believe that Alpamare was as successful as was being portrayed by Roland Duce<sup>73</sup>. Her concern was that the Waterpark would require future subsidies from the Council, but this fact was being downplayed by Roland Duce. Councillor Donohue-Moncrief stated that Councillor Fox spoke to her before the meeting, and he did not seem overly concerned if the loan was not approved. This was however in contrast to the then deputy leader, Councillor Derek Bastiman, who Councillor Donohue-Moncrief felt put a lot of pressure on her to support the recommendation.

- 119 Councillor Donohue-Moncrief also stated that Roland Duce would frequently try to re-negotiate the detail of agreements or go back on previous undertakings. She therefore regarded him as an unreliable partner for the Council. During the period between the loan being agreed and the loan agreement being signed, Councillor Donohue-Moncrief again questioned whether it was in the Council's interests to proceed. Her concerns were apparently ignored.
- 120 All the councillors interviewed at part of this review stated that they understood that there were risks with granting the loan to Benchmark Leisure Limited. They also thought that officers had set out all the information they needed to make an informed decision. The information was also balanced and did not seek to influence the outcome. For each report, officers did not recommend specific options but left it to Full Council to decide on the balance of the risks as presented. Those councillors who voted in favour of the loan considered that the benefits of delivering the Waterpark outweighed the potential risks whereas those who voted against the proposal thought the risks were too high. Those in favour also thought there was no other realistic option. Councillor Derek Bastiman stated that *'we were the administration at the time and we were satisfied with what officers were telling us. We knew there was risks but we couldn't do it any other way. It was a case of balancing should we do it to deliver the PVA and tidy that side of town up or should we walk away and not do it. We felt as though we were over a barrel'*. It is also clear that officers made every effort to support councillors in the decision-making process. The Director of Democratic and Legal Services (Monitoring Officer) stated that *'officers provided detailed briefings, for which we were thanked. In addition, we operated an open door policy and I recall several Councillors coming to my*

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<sup>73</sup> After Alpamare entered into the CVA in January 2019, Councillor Donohue-Moncrief investigated the background to the company and found that in July 2013, the local press in Bavaria was reporting that visitor numbers to the Alpamare waterpark in Bad Tölz had declined and its future was in doubt. Without a subsidy, the waterpark was unlikely to remain open. The venue subsequently closed in August 2015. In addition, the Alpamare waterpark in Freienbach, Switzerland had been owned by a Spanish company, Aspro Parks since 1999 (but operating under licence as Alpamare). Aspro Parks is a large operator of visitor attractions across Europe including 10 sites in the UK but is not linked to Dr Anton Hoefer. It is not known whether this information was available to decision-makers in the Council at the time.

*office to seek clarity on points relating to this matter. The close voting of the September 2013 meeting demonstrated how finely balanced this decision was based on all the evidence presented. Senior officers regularly met with Cabinet and Group Leaders to discuss issues, including all those relating to the Sands development’.*

- 121 The councillors also had similar views about why the Waterpark had failed as a commercial venture. The reasons given included the unrealistic projections about visitor numbers, the pricing strategy and the lack of concessions for residents<sup>74</sup>, the impact of higher than expected utility costs, the ineffective marketing and publicity, and the delays in completing the Spa. Roland Duce blamed the Covid pandemic and the increase in energy prices following the start of the war in Ukraine for the failure of the Waterpark<sup>75</sup>.
- 122 As part of this review, a number of councillors raised concerns relating to some of the Council’s other dealings with Benchmark Leisure Limited. These were outside the scope of this review but included a decision by the Council to sell the freehold of Kepwick and Lockton House to Benchmark for £25,000. This potentially undervalued the future income from the leaseholders and allowed Benchmark to submit a planning application to construct additional penthouse apartments on the roof terrace. In addition, a proposal by another developer to build a multi-screen cinema on the North Street car park site was apparently blocked because it might undermine Benchmark’s ability to develop its own cinema on the Sands site. Officers have stated that there were equally many occasions when they took action to block proposals which had been presented by either senior councillors or Benchmark Leisure Limited due to concerns about their suitability and to protect the Council’s interests. In some cases, officers felt under considerable pressure to agree to the proposals.
- 123 Roland Duce believes that once the Waterpark was constructed, the Council actively prevented his attempts to bring forward other more profitable residential projects as part of the Sands Development. He stated that Councillor Bastiman would not agree to any further development phases until Benchmark Leisure Limited had built a multi-screen in the North Bay area. Councillor Bastiman apparently regarded the North Bay as the preferred location for a cinema. Roland Duce stated that he thought it was financially risky however he wanted to complete the Sands Development, so he agreed. Benchmark subsequently obtained planning permission for a multi-screen cinema. The scheme included residential accommodation and restaurant units. According to Roland Duce, the Council then further delayed the project so that construction work on the cinema could not

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<sup>74</sup> The ticket prices in 2023 were £20 for adults, £16 for children and £64 for families. In addition, visitors had to pay for parking.

<sup>75</sup> The Covid-19 pandemic will have contributed to the fall in visitor numbers in 2020 and afterwards, but it does not explain the problems encountered by Alpamare UK Limited before it ceased operating. The impact of the pandemic on the Waterpark and its commercial viability from 2020 onwards are not known but it is likely to have been a factor in its ultimate closure.

start<sup>76</sup>. Roland Duce believes that the Council's actions prevented Benchmark from benefitting from the profitable elements of the Sands Development and, as a result, the company was unable to exercise its option to buy the Waterpark. These claims are disputed by Council officers who stated that there were other reasons for the delay in progressing the cinema including the need by Benchmark Leisure Limited to obtain the necessary funding and a premises licence as well as to agree the terms of the supplementary agreement. The inability to obtain funding was the critical factor.

- 124 The understanding that this was a loan to Benchmark Leisure Limited is also disputed by Roland Duce. His view is that Benchmark contributed £5m towards the cost of the Waterpark but the Council provided the rest of the funding. Benchmark was responsible for arranging the construction and fitting out of the building, but the costs incurred were then reimbursed by the Council. According to Roland Duce, the Waterpark was always the Council's asset and should have been recognised as such. Benchmark was the tenant.

### **Release of the loan**

- 125 As noted in paragraph 78 above, Benchmark Leisure Limited could only draw down the agreed loan in instalments once each pre-determined stage of the construction work was completed. In addition, Benchmark had to fund the initial construction stages themselves. The estimated construction costs for each stage (contract sum analysis) were supplied by Tolent Construction Limited, and externally checked by a quantity surveyor. Once each stage was completed, Benchmark would notify the Council and request the release of the funds. The Council's Head of Projects, Chris Bourne<sup>77</sup> would then visit the site and assess whether the works had been completed. It is understood that on occasions the release of the funds was not approved until further work was undertaken or sub-contractors were paid. The loan agreement also included a further stage payment which covered the 'defects liability period'. One year after practical completion of the works, the Head of Projects undertook a further site visit to identify any remaining snagging issues. The Council then paid the last instalment of the loan once the snagging issues had been resolved.
- 126 Appendix 2 sets out the pre-determined construction stages and the actual stage payments made to Benchmark Leisure Limited. The completion of the Spa was not included in the original estimate of costs. Instead, a provisional sum of £615k was identified for the associated works. The payments to Benchmark were disclosed in the Council's annual financial statements as a long-term investment rather than a property related asset. The 2015/16 financial statements included details of the loan as notes to the accounts, with the value of the loan at 31 March 2016 shown as £5,917k. The carrying

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<sup>76</sup> Roland Duce believes these further delays were due to the change of administration at the Council (in May 2019) when Councillor Siddons became Leader. Councillor Siddons apparently favoured building a cinema in the town centre rather than in the North Bay area. Roland Duce provided a copy of a written statement given by Councillor Bastiman to support this.

<sup>77</sup> Chris Bourne is a professional quantity surveyor and has been a member of the Royal Institution of Chartered Surveyors (RICS) for 30 years.



value was considered to be a reasonable approximation of the fair value of the investment. The notes to the accounts included a detailed explanation of the loan and the option for Benchmark to enter into a long-term lease for the Waterpark (see appendix 3). The accounting treatment was reviewed by the Council's external auditors, Mazars and the issue was addressed in their 2015/16 Annual Audit Letter<sup>78</sup>. Mazars noted that whilst the Council would own the Waterpark, Benchmark had contributed funds towards the cost of the asset. The year-end accounting treatment for the contribution and the asset was identified as potentially complex. Mazars therefore sought assurance from management and concluded that the Council's treatment of the asset was reasonable.

- 127 This review has not considered the adequacy of the checks carried out by the Council's quantity surveyor or whether the value of the works carried out by Benchmark Leisure Limited was as stated. It has been alleged that some of the equipment installed at the Waterpark, including the slides, was second-hand and reconditioned but it is not known whether this is correct or reflected in the costs presented. The abbreviated accounts for Benchmark Leisure Limited for the years ended 30 June 2016 and 30 June 2017 include the following values for investment properties:

<b>Market value / historical cost:</b>	<b>£</b>
At 1 July 2015	25,000
Additions during the year	8,028,805
At 30 June 2016	<u>£8,053,805</u>
Additions during the year	2,148,308
At 30 June 2017	<u>£10,202,113</u>

It is assumed that the additions relate to the construction costs of the Waterpark. The loan provided by Scarborough Borough Council is not disclosed as a liability in the accounts, so it is assumed that the costs are shown net of the Council's funding<sup>79</sup>.

- 128 A number of councillors have stated that the finished Waterpark did not match their expectations. The feeling was that it had been oversold but also that some of the finishes and materials used were of inferior quality. A number of elements were also not completed, for example, the lifts to the water slides were not installed and there was initially no heating management system. Some councillors expressed concerns that the finished build costs may have been less than was reported. The Head of Projects has confirmed that he was satisfied that the costs presented by Benchmark Leisure Limited were reasonable. He has also stated that the lift was an optional extra that did not form part of the original specification and was not installed by agreement with the Council.

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<sup>78</sup> The value of the investment was material to the accounts and the accounting treatment was identified as a specific risk by the auditors.

<sup>79</sup> It is also assumed that the Waterpark lease was treated as an operating lease within the accounts, with the annual lease payments charged to the profit and loss account. The full value of the asset and the associated debt obligations were therefore not disclosed. The abbreviated accounts however do not provide sufficient information to confirm this. The statement prepared by the company's administrators (dated 9/1/24) includes costs of £7.4m relating to the Waterpark.

- 129 A number of complaints were received during the construction phase from property owners adjacent to the Waterpark site. They included complaints about noise, drainage, non-compliance with planning conditions, and damage to access roads. Further complaints were received once the Spa facility opened. These complaints have not been considered further as part of this review.
- 130 It was also noted that one of the subcontractors, Aqua Leisure International Limited had to obtain a court judgement against Benchmark Leisure Limited for non-payment of debts relating to the construction of the Waterpark<sup>80</sup>. Following the judgement in December 2020, Benchmark was required to pay a sum of approximately £119k to the subcontractor.

### **Monitoring of the lease conditions**

- 131 As noted in paragraph 89 above, Benchmark Leisure Limited was required to pay a sum equivalent to 8% of the annual turnover of the Waterpark, and the adjoining car park, into an 'improvement fund' held by the Council. Following the signing of the lease on 29 July 2016, the Council requested confirmation from the company's auditor of the annual turnover of the Waterpark. In recent years, this certificate was not provided to the Council despite repeated requests. It was therefore not possible to accurately calculate the sum due. Other information was not provided by Benchmark to the Council, for example details of the rent received by Scarborough Water Park Hotel Limited for the Premier Inn hotel.
- 132 Councillor Derek Bastiman stated that he became more actively involved in the ongoing negotiations with Benchmark Leisure Limited once he became Leader in May 2015. Roland Duce attempted to re-negotiate the terms of the lease on a number of occasions, including the rate of interest payable on the loan. He resisted this. Councillor Bastiman also noted that Roland Duce was keen to develop other areas of the Sands but he would not permit this until the Waterpark was fully completed. He finally agreed to allow Benchmark to locate caravans on the Kinderland site in 2018, when Roland Duce informed him that the company was facing financial difficulties.

### **Debts owed to the Council**

- 133 The financial difficulties experienced by Alpamare UK Limited in late 2018 alerted the Council to the possibility of default by Benchmark Leisure Limited<sup>81</sup>. Assurances were sought from Benchmark that the Waterpark would continue to be able to operate as a going concern. On 31 January 2019, the Director of Business Support (s151 Officer) provided a verbal update on the issue to the Council's audit committee. He noted that Benchmark had taken a number of steps to improve the financial viability of the Waterpark, including better management of energy costs and measures to increase visitor numbers. The opening times of the Waterpark had been reduced in winter, a range of discounts for residents and regular

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<sup>80</sup> Aqua Leisure International v Benchmark Leisure Limited [2020] EWHC 3511 (TCC)

<sup>81</sup> A number of councillors stated that they were already aware of the problems because employees were not being paid.

users was being considered, the luxury spa was expected to open shortly, and a hotel was planned to be built alongside the Waterpark as the next phase of development. The Director of Business Support (s151 Officer) also confirmed that *'there were provisions in the legal agreements to allow the Council to take more direct action if required including potentially taking action to forfeit the Waterpark lease should Benchmark default on its terms'*. A full copy of the meeting minute is included in appendix 4.

- 134 However, the rent due on 25 March 2019 was not paid by Benchmark Leisure Limited on time. The Council therefore required payment of the outstanding rent before it would agree to the lease of the hotel site (see paragraph 98 above). No further payments of rent were made after this date and the Council therefore commenced legal proceedings to recover the outstanding debts. A letter before action was issued in January 2021<sup>82</sup>. At the time, the total amount owed to the Council was £1,111,450 including VAT plus legal costs. The debt comprised the following:

	£
Rent (7 quarters)	770,000
Improvement sums	120,000
s106	67,450
VAT	154,000
Total	<u>£1,111,450</u>

- 135 As full settlement was not received, the Council applied to the Courts to enforce the guarantee of £1m given by Abbey Commercial Investments Limited. The claim related only to the outstanding rent payments<sup>83</sup>.
- 136 In response, Benchmark Leisure Limited and Abbey Commercial Investments Limited made a settlement offer of approximately £1.452m (with £694k to be paid in seven instalments of £99,145). This sum represented 11 quarters of outstanding rent plus interest. Abbey Commercial Investments Limited also offered to pay a proportion of the Council's legal costs<sup>84</sup>. The Council's cabinet considered the settlement offer on 17 May 2022 and accepted it. However, Benchmark and Abbey then attempted to renegotiate the terms of the settlement. As a result, the Council recommenced court proceedings for the outstanding debts. Benchmark Leisure Limited and Abbey Commercial Investments Limited then made a revised settlement offer of approximately £1.773m plus legal costs (this included £553k to be paid in five instalments of £110,584 commencing 24 June 2023). The settlement agreement was completed on

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<sup>82</sup> It is understood that recovery action was delayed due to the restrictions in place during the Covid-19 pandemic.

<sup>83</sup> Benchmark Leisure Limited paid £110,000 in December 2020 (relating to the rent due in June 2019) so the claim was instead for 6 quarters of overdue rent totalling £792,000 (£660,000 plus VAT) plus interest and costs.

<sup>84</sup> The offer was to pay 100% of the Council's legal costs incurred in pursuing the debt plus 50% of the costs of documenting the settlement (capped at £2k).

25 October 2022<sup>85</sup>. The initial payment of £1,252,774 was received by the council on 10 November 2022. The remaining payments were not made.

- 137 Subsequently, Benchmark Leisure Limited failed to pay the rent due on the Water Park lease on 25 December 2022 and 25 March 2023. The Council therefore issued a letter before action in respect of the first outstanding quarter, in February 2023.

- 138 The outstanding debt owed by Benchmark Leisure Limited at 31 March 2023 was £7.903m. This comprised:

	£
Total sum advanced	9,000,000
Add: accrued interest in period to 31/3/2023	3,097,899
Less: rent / settlement payments received (see below)	(4,195,361)
Outstanding debt <sup>86</sup>	<u>£7,902,538</u>

The rent / settlement payments comprised:

	£
Rent payments 27/7/2016 – 24/6/2019	1,397,151
Alpamare sub-lease guarantee – paid April 2019	580,000
Allocation of car park income	1,201,315
Settlement – paid November 2022	<u>1,016,895</u>
Total repayments	<u>£4,195,361</u>

- 139 The outstanding debt included £523,105 of overdue rent payments.
- 140 A confidential asset valuation report prepared for the Council by BNP Paribas Estates in March 2023, valued the Waterpark at £2.7m. The value was based on an open market valuation with vacant possession.<sup>87</sup>
- 141 The funds held in the balance sum account were initially used by the Council to support the costs of redeveloping the Open Air Theatre. This followed the agreement with Benchmark Leisure Limited in February 2009, which resulted in the company's development rights in respect of the Open Air Theatre being suspended. Approximately £159k was used for this purpose. As noted in paragraph 94 above, Marston's paid a sub-lease premium of £920k as part of the agreement to build the Tunny Catch pub and restaurant. The Council agreed that these funds could be used by Benchmark Leisure Limited to make improvements to the Burniston Road car park. The sub-lease premium was therefore paid into the balanced sum account. The transactions on the balance sum account show that income of

<sup>85</sup> The settlement involved the payment of £1,220,274 (£1,016,895 plus VAT) immediately plus £32,500 in respect of legal costs. The remaining sum of £552,923 was to be paid in five equal instalments on 24/6/23, 29/9/23, 24/6/24, 29/9/24 and 25/3/25. The settlement agreement was deemed to be in satisfaction of the £1m guarantee provided by Abbey Commercial Investments Limited in respect of the Waterpark lease.

<sup>86</sup> A proportion of the outstanding loan will effectively be repaid from future car park income (total repayments are estimated to be £2.294m).

<sup>87</sup> As noted previously, the Waterpark cost £14.4m to build. The wider benefits and possible additional notional value of the Waterpark as a community asset have not been quantified.

£906k<sup>88</sup> was received from land sales and the car park improvement costs totalled £893k. The remaining funds held in the balance sum account at 31 March 2023, totalled £12,226.65. The Council's position, and confirmed by external legal advice, was that Benchmark ceased to have any claim over these funds once the Development Agreement expired on 17 March 2021<sup>89</sup>. Roland Duce disputes both this and the calculation of the funds held. His view is that the funds held in the balance sum account should be a lot higher and are due to the company.

### Meetings with Roland Duce and Anton Hoefer

- 142 Councillors and officers regularly met Roland Duce to discuss the Sands development and the Waterpark. Some of these meetings also involved Anton Hoefer. The majority of the meetings were held at the Council's offices or at the Waterpark, however, there were occasions when meetings were held elsewhere. Roland Duce claimed that Councillor Tom Fox and a couple of other councillors visited the Alpamare waterpark in Bavaria and met Anton Hoefer. However, there is no record of such a visit taking place. Councillor Tom Fox categorically denied visiting Bavaria or anywhere else overseas in connection with the Waterpark development. Councillor Bastiman also confirmed that he was not aware of any councillors visiting the Alpamare waterpark in Bavaria<sup>90</sup>.
- 143 A response by the Council to a Freedom of Information request dated 19 February 2019, confirmed that the following meetings had taken place at other venues in the previous year<sup>91</sup>:

Date	Attendees	Venue
1 June 2018	Roland Duce, Cllr Bastiman <sup>92</sup> , Cllr Mallory <sup>93</sup> and the Director of Business Support (s151 Officer)	Durrants Hotel, London
19 October 2018	Roland Duce, Simon Wake (Endeavour Partnership), Cllr Bastiman, the Director of Business Support (s151 Officer) and the Head of Legal and Governance (Deputy Monitoring Officer)	Waterwheel, Howden
26 October 2018	Roland Duce, Cllr Bastiman, the Director of Business Support (s151	Palm Court, Scarborough

<sup>88</sup> It is assumed that the difference of £14k between the sub-lease premium due and the amount paid into the balance sum account related to legal fees.

<sup>89</sup> The Development Agreement included a provision that on termination of the agreement (by expiry or otherwise) any funds held in the balance sum account would belong to the Council.

<sup>90</sup> As noted in paragraph 115 above, Councillor Tom Fox and other group leaders met Roland Duce and Anton Hoefer at a hotel in London sometime in 2013. The meeting was arranged there because Anton Hoefer was in the UK for a brief visit. It is not known whether officers were also present at the meeting.

<sup>91</sup> The response also confirmed that copies of electronic diaries were not kept for longer than 12 months.

<sup>92</sup> Councillor Derek Bastiman was Council Leader from May 2015 to May 2019.

<sup>93</sup> Deputy Leader and Cabinet Member for Corporate Investment

<b>Date</b>	<b>Attendees</b>	<b>Venue</b>
	Officer) and the Head of Legal and Governance (Deputy Monitoring Officer)	
10 January 2019	Roland Duce, Cllr Bastiman and Cllr Mallory	Palm Court, Scarborough

- 144 The purpose of the meeting at the Waterwheel, Howden was apparently to discuss the proposed development of the hotel site. Roland Duce requested that the meeting be held there. Other meetings also took place at Roland Duce's home, again at his request<sup>94</sup>. The meetings were all related to Council business. A number of officers also attended a meeting held with Roland Duce and his professional advisors at the Holiday Inn near Doncaster in late 2015 or early 2016. The meeting was held to discuss the Waterpark.
- 145 No evidence has been found to suggest that councillors or officers accepted gifts or hospitality from any third parties. Roland Duce also confirmed that he had not offered any gifts or hospitality to councillors or officers.

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<sup>94</sup> Councillor Bastiman confirmed that he attended a meeting at Roland Duce's home (in Thurgarton, Nottinghamshire) with the Director of Business Support (s151 Officer) and the Head of Legal and Governance (Deputy Monitoring Officer). Roland Duce also stated that the Director of Business Support (s151 Officer) visited his home to discuss changes to the proposed Supplementary Agreement but this is denied.



## Conclusions

- 146 The proposal considered by Councillors on 9 September 2013 was both risky and complex in nature. The decision taken by Councillors was taken in the knowledge that there were risks, but in the interests of Scarborough and its residents, and to ensure the Waterpark and wider Sands regeneration could be completed. The decision was also taken at a time when Councils were being encouraged to adopt a more commercial approach at a time of austerity.
- 147 The Council recognised that there were a number of risks in granting the loan to Benchmark Leisure Limited and therefore put in place various mitigations. These included only permitting the funding to be drawn down in stages linked to the construction of the Waterpark, ensuring the risk of any cost overruns would be met by Benchmark, requiring parent company guarantees and limiting the ability of Benchmark to develop other parts of the Sands until the loan was repaid. External legal advice was also obtained on the proposed agreement and associated governance measures. Importantly the Council also ensured that it retained the freehold interest in the site which safeguarded the Waterpark as an asset.
- 148 Officers involved the Leader, Cabinet Members and other Councillors in working groups and briefing meetings throughout the period prior to the decision being taken. The reports prepared by officers also contained sufficient information for Councillors to make a considered decision but there was a lack of clarity about key aspects of the proposed agreement with Benchmark Leisure Limited. In particular, it was not clear whether the Council was borrowing funds to part-finance the construction of the Waterpark or whether it was to enable the Council to provide a commercial loan to the company. Officers also failed to provide a recommendation to Full Council based on their professional knowledge and assessment of the risks. This was a particular omission given the complexity of the proposed agreement with Benchmark.
- 149 The reports to Full Council contained details of the potential risks of the agreement but in some cases these risks were not fully and properly articulated. Insufficient attention was also given to the actions which could be taken to mitigate those risks.
- 150 The key risk that the Waterpark might not be commercially viable was recognised by Councillors and officers but not adequately addressed. The projections for visitor numbers prepared by Benchmark Leisure Limited and Alpmare UK Limited were overly optimistic, but these were not properly challenged. Instead, the Council appears to have placed too much reliance on the findings of the feasibility study undertaken by Leisure Development Partners LLP but commissioned by Benchmark. This is despite the concerns expressed by GVA about the assumptions and projections used in the study. Alpmare also had no experience of operating Waterparks in the region and therefore limited knowledge of the local visitor economy. Inadequate due diligence was carried out on Alpmare to determine whether the company was a suitable operator for the Waterpark. The problems being experienced at the existing Alpmare waterpark in Bavaria were therefore not identified.

Despite the obvious risk that the Waterpark might not be profitable, the Council failed to develop any contingency plans until after Alpamare entered into a company voluntary agreement in 2019.

- 151 With hindsight it is apparent that the decision to approve the loan to Benchmark Leisure Limited was based on incomplete information and therefore put the Council at increased risk. Councillors understood that there were risks with the proposed agreement, but the report should have set these out more clearly. In the circumstances, it is not possible to know whether the decision by Full Council would have been different, but at least Councillors could have been better informed.
- 152 No evidence has been found to suggest that Councillors or officers accepted gifts or hospitality from any third parties.
- 153 The lessons from this review should inform the decision-making processes for any future regeneration projects. In particular, the need to effectively identify, report and mitigate potential risks to the achievement of project objectives, and to adequately balance potential risks and rewards.

### **Confidential Minute of the Council meeting held on Monday 9 September 2013**

#### **Item – 15 The Sands Waterpark proposals**

The Council considered a report by the Director of Business Support (Reference 13/307) which asked Council to consider two Options A and B concerning the Waterpark proposals and determine with which Option to proceed.

Members had previously had the opportunity to attend detailed presentations from Mr Duce, Benchmark regarding the Waterpark proposals and ask questions. Members also had the opportunity to attend separate detailed briefings given by the Director of Business Support and the Director of Legal and Democratic Services and ask any questions including those concerning the financial, legal and other implications of the proposals prior to the meeting. The briefings had been well received by Members as they provided very detailed explanations of the full financial and legal risks involved in progressing the proposals. Members thanked both Directors for their approach to ensuring that Members had a clear understanding of all the implications of the proposed deal.

The Council adjourned the meeting to allow a final presentation from Mr Roland Duce, Benchmark to take place and for Members to ask questions of Mr Duce only, following which Mr Duce left the Chamber prior to Members' commencing their debate.

The Leader on introducing the report, referred to negotiations with Mr Duce which took place after the report was published and advised Council of two amendments to the sub-recommendations for Option A to agree to the proposal set out in the Revised Heads of Terms for funding the construction of the Waterpark. Details had been circulated to Members in an Addendum to the report prior to the meeting. Councillor Fox advised that sub-recommendation (iv) for Option A should delete reference to the Northstead Car Parks and sub-recommendation (vi) should amend the authority delegated to the Director of Business Support to borrow up to £9 million not £9.50 million as stated. Councillor Fox advised that both amendments also applied to other references throughout the report and appendices and rose to propose Option A which was duly seconded by Councillor Bastiman.

Councillor Broadbent proposed Option B to reject the proposal set out in the Revised Heads of Terms for funding the construction of Waterpark and this was duly seconded by Councillor Challen.

Members were advised by the Director of Democratic and Legal Services that both Options were available as a choice and both Options could be kept open prior to voting.

Councillor Jeffels commented that this was a very difficult and challenging decision with long-term implications. He considered that it was vital that Scarborough had major new investment if it was to remain one of the leading holiday resorts. He added that he did have reservations, this being one of the biggest decisions to be made by Council in 40 years, and that he was aware of the risks involved in taking the proposals forward. However, he considered that Council should look at the

“bigger picture” and send a message that we welcomed new investment and expressed his support for Option A.

Councillor Mrs Clegg expressed grave reservations, particularly the late and recent changes to the agreement with Benchmark and also the legal and financial risks highlighted by the Directors in their briefings including the potential for challenge under procurement law including EU challenge. Councillor Mrs Clegg referred to the Marine Drive project, the costs for which had escalated from the original estimate, which had been the subject of criticism due to non-compliance with EU tendering procedures. She acknowledged the attractiveness of a waterpark but considered that Scarborough’s location was a concern as the town was not located in an area surrounded by a sizable population. Councillor Mrs Clegg added that whilst the recent summer season had been wonderful, people did not have as much money to spend, the risk to the Council was too great, particularly when budget cuts were becoming increasingly severe and she could not therefore support it.

Councillor Ward referred to a local newspaper article – who wouldn’t want a waterpark? Much had changed in the current report but the Council was facing the largest financial risks. Councillor Ward questioned the evidence to back up the anticipated visitor levels and attraction entry costs, commenting also on the location of other attractions in the UK which were close to motorways unlike Scarborough. Councillor Ward added that he also believed that the risk to Council tax payers was too great and he would support Option B.

Councillor Broadbent commented that residents had waited for the right attraction for years but the recent development agreement changes had led to extreme uncertainty and he couldn’t recommend accepting Option A. Although he appreciated that residents were keen to see a major attraction come forward and officers had taken steps to mitigate risks, the Council was now in a situation of extreme uncertainty and the legal risks together with the financial risks could lead to a situation where the Council was responsible for a closed waterpark. There were other developers out there and the decision should not be rushed.

Councillor Mrs Cluer commented that there had been a long wait for a waterpark and the Council report provided many papers including highlighting the major risks involved. The Officer assessment was that turnover less than £250K per annum was not viable – a detailed viability assessment was required. Councillor Mrs Cluer added that there was nothing to guarantee that Benchmark would buy back the Waterpark. The long term economy was uncertain, energy costs were high and queried whether heating a waterpark would be viable. The Council was facing significant financial pressures and if the highlighted risks for Option A came to fruition this would cause additional problems.

Councillor Mrs Mortimer highlighted limited developer interest in developing a major attraction in Scarborough adding that other attractions in the UK which she had visited were not the same as the proposed Waterpark. People could just as easily travel to Scarborough and the Borough did need an all weather attraction. Councillor Mrs Mortimer added that she had looked at the risks but there were risks involved with everything and the Addendum to the report circulated had helped as the Council would now be retaining some car parking income.

Councillor Challen questioned the unavailability of a representative from Alpmare at Council to help make a decision on a £15 million project. He referred to the detailed briefing from the Director of Business Support (s151 Officer) and the Director of Democratic and Legal Services (Monitoring Officer) which had helped make up his mind. Prior to the briefing he had been 51% in support of the waterpark whereas after the briefing he was 51% against the proposals. He commented that he considered there to be a lack of evidence from Mr Duce and he wanted to see more evidence as to why the proposal should be supported.

Councillor Chatt expressed concern with regard to the recent newspaper article and interview with Mr Duce which Councillor Chatt considered was unprofessional. He also expressed concern with regard to the financial arrangements, lack of detail, recent changes to the agreement terms and sum required from the Council. Large Council budget savings would be required in future and he commented that he had lost faith now.

Councillor Sharma referred to earlier meetings regarding the waterpark proposals which had suggested that a financial contribution from the Council would not be required. Now all long-term liabilities were the Council's responsibility and there was no guarantee that Benchmark would buy the waterpark back from the Council. He queried whether the Council would have to put money in to finish the water park if it wasn't completed. Whilst Councillor Sharma supported the idea of a waterpark, all arrangements should by now be in place. He added that he had asked about the proposal's feasibility and considered that the Council should now reassess the market also commenting that the catchment area of Blackpool was much greater than Scarborough's.

Councillor Chance commented that he considered that if the Council didn't grasp this now, the Council would have a blighted site. Facilities at other UK venues were not the same as the proposal before Members – e.g. South Shields was a leisure pool which aimed to attract visitors for a few hours, not all day. Yes, there would be peaks and troughs but the resort was "tired", the Borough was not bringing in people as it used to and Option A was the right decision. He considered that the Councillors needed to have the "courage of our forefathers".

Councillor Haddington said that this was an opportunity he would like to see come to the Borough adding that this decision gave the opportunity to do something. Many people would like to see extreme rides – this was what people were wanting and he would be supporting Option A.

Councillor Jenkinson commented that there was a consistent turnover of people visiting and the Borough needed them to have something different. He added that he had visited theme parks but he thought that the waterpark offered something unique and he was very much in favour of Option A.

Councillor Abbott commented that in view of the large visitor numbers to the Borough there would be a big demand for a facility. He added in expressing his support for Option A, that having been in the hospitality business what the Borough wanted is a waterpark which caters for visitors all year round.

Councillor Cockerill commented he had previously welcomed the proposed privately funded waterpark. However, despite some recent amendments to terms,

they remained agreeable to Benchmark and much less so to the Council. The Council bore a greater level of risk which in his opinion was unacceptable – the proposal was too complex and risky and he likened the situation to the Council acting as one of the “dragons” from “Dragons’ Den”. He added that he wasn’t against a waterpark but this proposal wasn’t in the best interests of the Council and he was “out”.

Councillor Mrs Jefferson commented that she had attended excellent briefings from the Directors of Business Support (s151 Officer) and Democratic and Legal Services (Monitoring Officer) and was given lots of information. The waterpark would cost £14.5million to build and Councillor Mrs Jefferson wanted a breakdown of costs including equipment at the waterpark which she considered would devalue quickly. Councillor Mrs Jefferson added that she was concerned that Benchmark would put in £5 million – she would have preferred that Benchmark funded 50% of the costs. Benchmark would now pay it back if they could. She noted that Mr Duce had said today that wise people rent and therefore she queried whether he would ever buy the waterpark back. Whilst the Council would now retain some car parking income there were still a lot of unanswered questions, she was very concerned and did not want to make a rushed decision today.

Councillor Zegstroo referred to potential consequences, commenting whether Councillors could let the people of Scarborough be saddled with debt. In view of the forthcoming cutbacks he could not support Option A.

Councillor Mrs Robinson commented that most people supported a waterpark but evidence was needed to support its viability and for Councillor Mrs Robinson the evidence was not there. She added that Mr Duce had advised that the Banks don’t get it and are a bit frightened of the proposals – so was she.

Councillor Plant referred to hearing from 3 developers over the years and this was a fine opportunity – he would rather look at the positives of what it could do e.g. for shops and hotels. Councillor Plant acknowledged that there was a negative side but Option B would do nothing – was it value for money to spend more looking at something else? This was high risk but he would be voting for future generations and would support Option A.

Councillor Jay-Hanmer commented that this was a difficult decision which had to be made. Whilst a waterpark had been wanted for a long time, the mechanics were totally wrong from a business point of view. If the Council was willing to put £9 million into this scheme, the Council would be better putting it into something else the Borough wanted.

Councillor Popple referred to the loss of all attractions on the north side of Scarborough in the 1990s commenting that these had originally been due to be replaced within 2 to 3 years - people were still waiting. The Council now had the opportunity for something people could look forward to on the North side of Scarborough – a major attraction. Councillor Popple advised that people who had spoken to him had advised that the Council should go ahead and do it. Previous Councillors had taken risks and if this opportunity was rejected there would be more years of no development on the North side. People had been waiting for years of something to happen. Although he acknowledged that it could go wrong, the Council should take some risks and have a go.



Councillor Kenyon advised that she was still in a quandry as to whether she should support Option A. Looking at it with her financial “hat” on there were enormous risks and she queried whether those legal and financial risks were worth taking. She questioned whether the Council should do what is right for the Borough by supporting the waterpark or reject it which would indicate that Scarborough was closed for business.

Councillor Watson commented that in his opinion the risks were too great and he hadn’t been elected to gamble with rate payers’ money. He questioned what would happen if the proposals went wrong. The gamble was too great.

Councillor Bastiman referred to the Zenith project from 1995 and noted that this was now 2013. The Bridlington waterworld attraction referred to was a leisure pool with slides. The Marine Drive project had also been referred to but that was much more complex than the proposed waterpark, adding that it was normal business practice to rent property. Councillor Bastiman gave his support to Option A as this was backed by the delegated authority to the Leader of the Council to proceed only when he was satisfied that sufficient legal and financial due diligence had taken place.

The Mayor, Councillor Backhouse, thanked Members for a very healthy debate. He added his support for Option A commenting that this could be a catalyst for regeneration and he understood that the Council was facilitating a loan. By approving Option A, the Development would only get underway after 31 March 2014 provided that all sub-recommendations were in place. Final approval would be delegated to the Leader of the Council. He commented that you get nothing without a risk and he did not see this as a gamble. The Council needed to consider this very carefully for future generations throughout the whole of the Borough. The Mayor, Councillor Backhouse, sought confirmation that the matter would be referred back to Council should the Leader of the Council not be satisfied at the end of the due diligence process.

The Leader of the Council, Councillor Fox concluded by saying that he wanted to get into the detail of the safeguards for Option A. Viability was part of the considerations alongside due diligence and the right price and he noted that this was in the report. Milestones were required for a process of staged delivery and that if this was not achieved, the agreement would cease. There were still some legal issues to be resolved to be absolutely sure, particularly regarding State aid and European Procurement rules. Councillor Fox accepted this and also agreed that the terms of the Head Lease with Benchmark and other legal matters were still to be finalised. If all matters were not agreed to his satisfaction at any time before 31 March 2014 it would be brought back before full Council. Councillor Fox referred to sub-recommendation (v) regarding maintenance of momentum of the overall development under which the Council may grant occupation under licence to construct further phases, advising that further leases would not be granted prior to opening the waterpark. This was still not a “done deal” but allowed continued engagement in the process.

After the lengthy debate, in excess of 8 Members stood to request a recorded vote and Option A to agree to the proposal for facilitating the funding of the construction of the Waterpark as amended was put to the vote.

<b>For Option A as amended</b>	<b>Against Option A</b>
Cllr A Abbott	Cllr J Armsby
Cllr G W Allanson	Cllr S P Bairstow
Cllr G A Backhouse (Mayor)	Cllr D L Billing
Cllr Mrs S E Backhouse	Cllr E Broadbent
Cllr D J Bastiman	Cllr C R Challen
Cllr Mrs L M Bastiman	Cllr W Chatt
Cllr D A Chance	Cllr Mrs D Clegg
Cllr G Coulson	Cllr Mrs D V Cluer
Cllr Ms M Donohue-Moncrieff	Cllr M J Cockerill
Cllr T W Fox	Cllr Ms T M Davy
Cllr S B Green	Cllr G Evans
Cllr C Haddington	Cllr J G Flinton
Cllr D C Jeffels	Cllr M Jay-Hanmer
Cllr A Jenkinson	Cllr Mrs J Jefferson
Cllr Miss J Kenyon	Cllr N K Murphy
Cllr Mrs H F Mallory	Cllr Ms R K Murphy
Cllr Mrs P Marsburg	Cllr Mrs A Robinson
Cllr Mrs P Marsden	Cllr S C Sharma
Cllr Mrs J E Mortimer	Cllr S Siddons
Cllr J Plant	Cllr M H Ward
Cllr P G Popple	Cllr B F Watson
Cllr E M Smith	Cllr J Zegstroo
Cllr W H Tindall	

**RESOLVED** that subject to amendment to the sub-recommendations for Option A as detailed below and in the Addendum to the report and also where repeated within the body of the report, Option A to agree to the proposal set out in the Revised Heads of Terms (Appendix A) for facilitating the funding of the construction of the Waterpark be approved as follows:-

- (i) Extend the Development Agreement to 31 March 2014 for the commencement of the Water Park construction;
- (ii) During this intervening period instruct Officers to conclude the following negotiations:
  - a) Agree the terms of the Supplemental Agreement between the Council and Benchmark;
  - b) Agree the terms of the Head Lease and Under-Lease.
  - c) Confirm the level and terms of the financial guarantees.
  - d) Finalise the State Aid and procurement legal position, together with any appropriate mitigation.
  - e) Agree milestones for the staged delivery of the next phases of the development, and incorporate these milestones within the Supplemental Agreement.
  - f) Carry out further due diligence on the estimated construction costs for the Water Park.
  - g) Benchmark to carry out an external financial viability assessment and financial sensitivity model for operating the Water Park.

- (iii) On satisfactory conclusion of the recommendations (i) and (ii) above delegate authority to the Leader to agree that the Council enters into the Supplemental Agreement and all other relevant agreements with Benchmark in relation to the construction of the Water Park;
- (iv) Note that Benchmark are likely to seek approval from the Council to draw down the next phase of the Sands Development (being Kinderland and Burniston Road Car Park) whilst the Water Park is still being constructed;
- (v) Accept that to maintain momentum of the overall development, the Council may grant occupation under licence to construct these further phases (as referred to in (iv) above), however the Council will not grant a lease until the milestones (to be agreed) are achieved which will include the opening of the Water Park;
- (vi) Delegate authority to the Director of Business Support to borrow up to £9 million to fund the Council's contribution towards the Water Park construction costs;
- (viii) Approve a budget of £40,000 from the Capital Contingency Reserve to fund the costs of concluding the outstanding issues as detailed in recommendation (ii) above.

### **Reasons**

To enable Members to consider the Options available to them in respect of the future of the Sands Development, in particular the opportunity to facilitate the delivery of the Water Park.

**Waterpark agreed stage payment schedule**

Stage	Completion of stage (excluding VAT)		
	Build Contract (£)	Rides (£)	Total (£)
Complete Precast Upper Floors and Staircases to Amenity Building.	1,069,425		1,069,425
Complete Amenity Building Roof Coverings.	840,770		1,497,416
Procure Pumps, Wave Machine and Rides.		656,645	
Complete Concrete Basement (including strike formwork).	869,760		1,285,155
Receive Pumps and Pipework and Rides Procurement.		415,396	
Complete Amenity Building Blockwork.	1,097,296		1,585,430
Procure Ride Steelwork and Plant and Commence Steelwork and		488,134	
Complete Structural Steelwork Pool Hall and Ride Tower.	1,059,351		1,367,063
Receive Plant and Rides Erection Ongoing #1.		307,712	
Complete External Glazing.	681,685		766,319
Receive Plant and Rides Erection Ongoing #2.		84,634	
Sectional Completion Certificate issued for first floor Spa Area.	237,630		322,264
Receive Plant and Rides Erection Ongoing #3.		84,634	
Complete Pool Hall Floor Finishes.	220,125		283,384
Receive Plant and Rides Erection Ongoing #4.		63,259	
Practical Completion Certificate issued.	429,754	50,798	480,552
Making Good Defects Certificate issued.	89,571	63,049	152,620
<b>Total stage payments</b>	<b>6,595,367</b>	<b>2,214,261</b>	<b>8,809,628</b>

**Actual stage payments made to Benchmark Leisure Limited:**

<b>Date paid</b>	<b>Loan advance (£)</b>	<b>VAT (£)</b>	<b>Total payment (£)</b>	<b>Interest (£)</b>	<b>Arrangement fee (£)</b>
13/10/2015	1,069,425	213,885	1,283,310	22,007	374
19/10/2015	1,497,415	299,483	1,796,898	30,177	524
23/11/2015	1,494,779	298,956	1,793,735	26,411	523
25/02/2016	795,846	159,169	955,015	8,753	279
21/03/2016	1,059,351	211,870	1,271,221	9,772	371
28/04/2016	322,264	64,453	386,717	2,104	113
12/05/2016	954,394	190,879	1,145,273	5,282	334
12/07/2016	170,125	34,025	204,150	205	59
29/07/2016	407,823	81,564	489,387	-	143
<b>Total (at practical completion)</b>	7,771,422	1,554,284	9,325,706	104,711	2,720
08/11/2016	781,605				
11/01/2018	150,000				
23/03/2018	189,542				
<b>Total</b>	<b>8,892,569</b>			<b>104,711</b>	<b>2,720</b>

**Total loan advance:**

	<b>(£)</b>
Loan payments	8,892,569
Interest	104,711
Arrangement fees	2,720
<b>Total</b>	<b>9,000,000</b>

The construction costs incurred by Benchmark Leisure Limited were understood to be £5,387,399.

**Note to the 2015/16 Statement of Accounts – Scarborough Borough Council**

**WATERPARK - BENCHMARK**

In April 2014 the Council entered into a supplemental agreement with Benchmark Leisure Limited (Benchmark) relating to the construction of the Water Park phase of the Sands Development. Under the terms of the agreement Benchmark are responsible for constructing a Water Park at an anticipated cost of £14.1 million. The first £5.1 million of the construction cost is funded from Benchmark's own funds and the Council will then provide funding of up to £9 million by way of a loan; with Benchmark being responsible for any cost overruns.

The Council's loan is paid to Benchmark on a staged basis, as works progress in accordance with agreed development milestones. Whilst the Water Park is being constructed any interest and finance costs incurred by the Council will be added to the outstanding loan amounts and thereafter a fixed, commercial rate of interest will be applied to outstanding amounts.

On practical completion of the Water Park the Council will grant Benchmark a 35-year lease on the facility and Benchmark will pay the Council fixed, commercial rentals on that lease. The rental payments will be used to repay the outstanding loan amounts.

Benchmark will be granted an option to buy the long leasehold interest in the Water Park within thirty years of its practical completion. The buy-back price will be equivalent to the outstanding loan amount at that time along with a sum for the associated land value. Benchmark will not be entitled to take any profit out of the Sands scheme until the loan has been repaid in full.

As at 31 March 2016 Benchmark had drawn down £5.97m (including interest charged to date) of the £9 million loan facility. This amount is shown in the Council's Balance Sheet as a long-term investment. The Water Park is due to be completed in summer 2016.

[A similar note was included in the 2016/17 statement of accounts although the value of the investment had by then increased to £8.56m]



### Minute of the Audit Committee meeting held on Thursday 31 January 2019

#### Item – 13 Alpamare Waterpark and Risk Assurance

The Director of Business Support (s151 Officer) gave a verbal update concerning the aims, plans, works and progress of the Sands Development which included the Water Park. This was to provide assurance that the Council continued to ensure that the developer would deliver the original aims and that effective risk assurance monitoring was in place to manage any issues. He added that he was happy to speak to any members direct who were interested.

Members were informed that a member of the public had submitted two questions, originally to the Overview and Scrutiny Board, but in view of meeting timings, the Audit Committee was in a better position to receive these questions and update on all issues. This was acceptable to the resident who was present.

The questions submitted were:

*a) Following the news of a winding up petition being filed against Alpamare UK Limited would the Overview and Scrutiny (O&S) Board be investigating the implications for the repayment of the £9million publicly funded loan to Benchmark Leisure?*

*b) Despite featuring on Alpamare's website and publicity map of the waterpark since July 2016, the wellness spa has still not been completed and opened. There have been a series of delays to Benchmark Leisure's timetable for the North Bay multiplex cinema, restaurants, apartments complex (originally scheduled for autumn 2018, then Easter 2019, now spring 2020). The latest planning application has fewer cinema screens & restaurants but more private apartments. Would the O&S Board be investigating whether, if Benchmark could not complete a small wellness spa in 2.5 years, they could realistically build the cinema, restaurants, apartments complex in one year?*

A map of the Sands development was displayed on screen and the Director of Business Support (s151 Officer) referred to a detailed timeline covering the full history of the origins of the development to the present day.

#### Origins and aims of the Sands development

- Original development agreement with Benchmark Leisure completed in 2002 and provided for the development of an area known as the Sands located at North Bay, Scarborough, update focused on 2009 onwards
- Fifty-five acres of land for development as a major tourist destination for the Yorkshire coast providing a range of tourist attractions, commercial development and accommodation 'Principal visitor attraction' component, primarily Open Air Theatre (OAT) and Waterpark
- Parallel complementary development around Peasholm area

#### Phased development

- Number of development phases (Cabinet/Council approval for each stage as appropriate)
- Payment to the Council for land value on each completed phase of development
- Land value based on £100k per acre or £1million for first phase
- First phase delivered - development of apartments/flats (some sold/rented), commercial units (some sold/rented)
- Surplus receipts from the first phase (£3.25million) funded OAT development

#### Change of Benchmark ownership (2011)

- Owner of Benchmark changed, re-focused phased development stages to concentrate on delivery of the Waterpark first then the rest of the development site

#### Waterpark funding and main loan conditions

- Full Council approved the main loan sum of £9million to Benchmark for the development of the Waterpark.
- Benchmark invested another £5million therefore a total of £14million.
- The Council's loan was structured so that Benchmark funded the first stages of the build and the Council's loan was only put in to fund the last stages.
- Loan to Benchmark was on commercial terms to comply with state aid rules. Council retained main land freehold, with 35 year land lease to Benchmark who in turn granted a lease to the operator Alpmare.
- Benchmark had the option to 'buy' a 150 year lease of the site subject to repayment of the loan.
- Due diligence undertaken as part of the loan.
- Benchmark took the risk of any development cost overruns above the projected £14million.
- Quarterly repayments of the loan from Benchmark to the Council through rental payments under the 35 year lease.
- Benchmark was not permitted to take any profit out of the Sands development until the loan was fully repaid.
- Loan structured so it would be fully paid back within 30 years

#### Waterpark opened (2016)

- Waterpark opened in July/August 2016.
- Other progress on the Sands has included delivery of Marston's pub on the site adjoining Burniston Road car park.

#### Alpmare financial difficulties (2018/2019)

- In late 2018, Alpmare experienced financial difficulties and its main creditor, British Gas, filed legal proceedings.
- Understood that some of utility issues can be attributed to incorrect tariff (residential instead of commercial).
- Benchmark stepped in to ensure Water Park continued to operate.
- Alpmare petitioned for, & secured, Company Voluntary Agreement (CVA)

The termination of the Alpmare sub lease triggered the requirement for Benchmark to pay the sub lease guarantee payment for which the Council had issued a demand.

#### Assurances / next steps (2019)

Lessons learnt from CVA:

- Alpmare revised Waterpark opening hours, e.g. reduced times in winter to better reflect demand and manage costs, looking at range of (discount) packages for users / residents.
- Better management of energy costs.
- Hotel development next to the Water Park is the next phase of development.
- Luxury spa is due to open in the very near future and prior to the grant of the lease of the hotel the spa must be finished and open to the public
- Other legal requirements prior to the grant of the lease of the hotel phase include ensuring all other payments due and owing by Benchmark to the Council are up to date such as rent/loan payments and sub lease guarantee payment.
- Regular meetings to be maintained with Benchmark to assure progress including regular loan repayments. Benchmark had experienced difficulties with the cinema phase and had revisited its plans for this phase which had included re-submission of planning.

Members commented that the speed of development was slow and it was important to maintain robust assurances should there be default by Benchmark. They were advised that there were provisions in the legal agreements to allow the Council to take more direct action if required including potentially taking action to forfeit the Waterpark lease should Benchmark default on its terms.

Members enquired about the car parking income from Northstead and were informed that as part of the Water Park loan approval the Council had agreed to accept lower loan repayments so that it could retain the ownership of and income from Northstead car parks, i.e. safeguard that income.

Members queried whether the Council, as a creditor (in terms of business rate returns), would only be getting the agreed 16/17pence per pound owed as part of Alpmare's CVA. This was confirmed, i.e. the balance would be 'written-off'.

Some concerns were expressed that the £9million loan was a significant liability and full information needed to be available to residents as tax-payers.

The Director of Business Support (s151 Officer) re-iterated that the Council had carried out due diligence and had put in place 'checks and balances' as far as possible to protect the Council's position. The worse-case scenario of Benchmark defaulting on the loan would result in the Council having to take action under the terms of the agreement with Benchmark with a view to taking back ownership of the Waterpark as well as terminating any rights to the remaining parts of the Sands Development site.

Director of Business Support (s151 Officer) reported that the current agreement with Benchmark ran to the end of December 2020 so members could review options before then.

**Resolved** - that further verbal updates on the Sands would be presented to the Audit Committee.