Forward Plan reference number: *Not applicable*

Report title: ***Proposed Company Voluntary Arrangement (CVA), Unit 1, Keighley Retail Park***	
Report to: *Nicole Wood, Executive Director for Finance & Technology*	
Report author: *Ian Fulton, Commercial Finance Business Partner*	
Date: 2nd July 2020	**For:** Decision
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County Divisions affected: *None*	

Confidential Appendix

This report has a confidential appendix which is not for publication as it includes exempt information falling within paragraph 3 of Part 1 of Schedule 12A of the Local Government Act 1972, as amended.

1. Purpose of Report

1.1 The purpose of this report is to approve that Essex County Council (ECC), or its appointed expert property consultants (Lambert Smith Hampton) on its behalf, vote to support the proposed Company Voluntary Arrangement (CVA) of its tenant, Poundstretcher Limited, based on the terms contained in this paper and its confidential appendix in relation to land in its ownership which is currently leased to Poundstretcher at Keighley Retail Park.

2. Recommendations

2.1 Approve that ECC vote in favour of the proposed CVA from Poundstretcher Limited by the deadline to do so of midnight on the 2nd July 2020. This approval is on the basis that it offers the best outcome for ECC based on the terms described in this report and the confidential appendix referred to.

3. Summary of issue

3.1 ECC owns land at Keighley Retail Park as part of its investment portfolio. Poundstretcher Limited is the tenant of Unit 1. The current 10 year lease is due to expire on 29th July, 2023.

3.2 The tenant pays rent and service charges under the lease as detailed in paragraph 1 of the confidential appendix.

3.3 The tenant has to date paid only one month of the payments due for the quarter March commencing March 2020 due to pressures caused by the Covid-19 outbreak but had previously indicated that the arrears would be cleared by the end of June 2020.

3.4 On the 15th June 2020, Poundstretcher Limited issued its CVA proposal, highlighting the difficult trading conditions that the company had been experiencing prior to Covid-19 and how the pandemic had increased these pressures despite the stores remaining open as essential retailers. There is a proposed turnaround plan for the business, and the tenant stated in a conference call that there is currently no immediate intention to close any stores but each will be monitored closely to evaluate their viability. The ECC store is one of 253 stores that are severely underperforming in a total store portfolio of 431 stores.

3.5 The proposal requires a vote to be approved by creditors, with a deadline of midnight on 2nd July 2020 to vote and then by shareholders on the 3rd July 2020. Approval is required by at least 75% (by value) of the creditors and more than 50% (by number) of unconnected creditors.

3.6 KPMG, advising Poundstretcher Limited, advise that if the CVA is not approved then the company will likely be put into administration as it would no longer be a going concern.

3.7 ECC have taken the expert advice of Lambert Smith Hampton, the authority's appointed property consultants, and Essex Legal Services (ELS) in this matter.

Options

3.8 **Vote to support the CVA proposal** – the main benefits that supporting the proposal will bring for ECC are:

- All rental arrears will be paid in full within 7 days of the end of the challenge period, so approximately 7th August 2020
- Rent due for the period 25th June 2020 to July 31st 2020 will be paid in full on 10th July 2020
- Rent due for the period 1st August 2020 to 13th August 2020 will be paid in full on 1st August 2020
- Rent due from 14th August 2020 to the end of the lease (July 2023) will be compromised at a rate of 12p in the £, and paid over 24 months from the 1st August 2020 with an assumption that mitigation will be found in a lower paying tenant for the final 10 months of the lease. The headline rental (income to ECC) reduces to zero as a result.
- The tenant will pay all service charge and insurance in full, monthly in advance, to the end of the lease (July 2023) or, if proper notice, is served by either side to end the lease earlier
- The tenant will remain responsible for business rates (at a compromised level) while the lease continues (to July 2023 at the latest)
- Either side can serve 30 days' notice to terminate the lease (the current lease doesn't contain either side break options and the landlord termination provisions are the usual forfeiture provisions although the lease provides that on a proposed assignment, ECC have a right to take a surrender at a price which is to be based on the market value of the leasehold interest. It is not clear how the termination provisions would be

construed in light of the moratorium on forfeiture provisions by peaceable re-entry so the 30 day notice period will need to be looked at in light of the provisions of the Landlord & Tenant Act 1965 which require a minimum notice period of 6 months for the landlord to terminate the effect of inserting a break provision in the CVA may not legally take effect unless there is a deed of variation and even if the lease was varied, there could be an issue with enforceability of any notice that ECC may serve to terminate the lease. There is a risk that ECC may only be able to terminate via forfeiture or if ECC and the tenant agree a surrender. Termination would allow ECC the ability to market the unit during the period when the rental level has reduced to zero.

- ECC can participate in a Profit Share Fund should the business turnaround succeed, although this would be only after 3 to 4 years and should be considered a remote likelihood.

3.9 While this proposal is far from ideal, it does allow the receipt of some rent and all of the service and insurance charges for ECC, with the business rates liability retained by the tenant while the lease continues. It also allows ECC the flexibility to market the unit and change tenants, albeit in a very harsh retail market where potential new tenants will not be plentiful in the short term. It is therefore the recommended option.

Paragraph 2 of the confidential appendix includes the relevant values.

3.10 **Vote to reject the CVA proposal** – KPMG, acting as advisors on the CVA, state that if the proposal is rejected the company is likely to be put into administration as it would no longer be a going concern. KPMG estimate that ECC (and other creditors) would only receive 7.6p/£ payment in this option (as opposed to the 12p/£ under the CVA proposal) and in a more delayed timeframe. It is also more likely under this option that ECC will have to take on the business rates' liability at an earlier date (which is dealt with further under paragraph 5.1). This option is therefore not a recommended option but clearly there are other impediments to the CVA being put in place as it needs to be carried by the relevant percentage, as set out in paragraph 3.5.

3.11 **Do nothing.** If ECC do not vote then there might be less chance that the resolution was carried. ECC would be bound by the CVA if it was adopted even if they did not vote for it. This option is not recommended.

3.12 **Take action under the lease** to forfeit the tenancy and seek to recover outstanding rent from the tenant independently. ECC could seek to liquidate the tenant company but the tenant may have applied for an Administration Order to obtain protection from creditors. There is a stay on forfeiture proceedings arising from non-payment of rent until September 2020 by virtue of recent legislation brought in as a result of the COVID 19 pandemic but ECC could potentially forfeit due to insolvency provisions. Subject to the effect of that recent legislation, the right of forfeiture may still be available but this will be subject to the right of the tenant to apply to the court for relief against forfeiture**.** Unless the vote on the CVA fails it seems unlikely that ECC realistically could rely on this option without issues arising but its rights would revert if the CVA comes to an end. This option is therefore not recommended.

4. Next steps

4.1 Once this decision has been approved, ECC will vote by midnight on the 2nd July 2020. If the proposal is supported by the requisite margins of creditors and, on the 3rd July, by shareholders then the CVA will be put into effect. Payments will be made in line with the timetable in paragraph 3.8 if not challenged.

5. Financial implications

5.1 The revenue impact of the CVA for 2020/21 would be a loss of rental income of £81,000, although this could be marginally reduced by receipts from the creditor fund. The impact in future years would be the full amounts included in the confidential appendix plus the business rates liability, estimated at £58,000, once the empty property exemption had passed, until a new tenant was found.

5.2 The income budget for the current financial year 2020-21 may still be achievable, as the total portfolio rent roll is currently higher than budget. However, due to the very difficult trading conditions currently across the portfolio as a result of the pandemic, it is far from certain that all other tenants will be able to meet their rental obligations. The existing tenancy void provision created for such situations could also be used to make good any shortfall.

5.3 As the tenant's dilapidations payment is also reduced under the CVA, there is a risk that ECC will incur costs over and above the compromised dilapidations contribution at the point there is a change in occupancy in the future.

5.4 Any professional costs to market the property and conclude new leases with future tenants would be met from existing operational budgets for this purpose.

6. Legal implications

6.1 A CVA is a procedure that allows a company to settle debts by paying only a proportion of the amount that it owes to creditors and to come to some other arrangement with its creditors over the payment of its debts.

6.2 If approved, the CVA binds all the unsecured creditors of a company who were entitled to vote on the CVA proposal. This means that a CVA binds creditors who voted against the CVA, creditors who received notice of the CVA proposal but who did not vote and creditors who would have been entitled to vote but did not receive notice of the CVA proposal, despite being entitled to be notified of it. So ECC will be bound by the CVA if it is adopted.

6.3 Once bound by a CVA, a creditor is prevented from taking steps against the company that the terms of the CVA prohibit. Even after a CVA comes into effect, it is open to the parties to agree a further compromise of the landlord's claim against the tenant

6.4 Where a landlord is bound by the CVA, all rent arrears will be caught by the terms of the CVA, as well as the tenant's liability for all other sums that are due or that will become due under the lease, including future rent. Whilst a CVA is in place, if the tenant then fails to comply with the CVA ECC would be unable to take action to enforce the debts under the lease without the leave of the court. However, if the tenant then fails to comply with the CVA, ECC may be able to instigate termination but only if the supervisor is in agreement as the CVA provides that, on the debtor company's default, creditors of the debtor company cease to be bound by the CVA, allowing them to pursue the debtor company for the balance of the debt due with the CVA supervisor's agreement. Depending on the liquidity at that point, recovery might be partially successful but is less likely to be wholly successful and ECC would have to take formal legal action to secure any redress.

6.5 ECC's options under the lease are set out in paragraph 3.12 above.

7 Equality and Diversity implications

7.1 The Public Sector Equality Duty applies to the Council when it makes decisions. The duty requires us to have regard to the need to:

(a) Eliminate unlawful discrimination, harassment and victimisation and other behaviour prohibited by the Act. In summary, the Act makes discrimination etc. on the grounds of a protected characteristic unlawful

(b) Advance equality of opportunity between people who share a protected characteristic and those who do not.

(c) Foster good relations between people who share a protected characteristic and those who do not including tackling prejudice and promoting understanding.

7.2 The protected characteristics are age, disability, gender reassignment, pregnancy and maternity, marriage and civil partnership, race, religion or belief, gender, and sexual orientation. The Act states that 'marriage and civil partnership' is not a relevant protected characteristic for (b) or (c) although it is relevant for (a).

7.3 The equality impact assessment indicates that the proposals in this report will not have a disproportionately adverse impact on any people with a particular characteristic.

8 List of appendices

a. The confidential appendix
b. The EQuIA

9 List of Background papers

None

I approve the above recommendations set out above for the reasons set out in the report. Nicole Wood, Executive Director for Finance & Technology	Date 2nd July 2020

In consultation with:

Role	Date
Councillor Christopher Whitbread, Cabinet Member for Finance	2nd July 2020
Executive Director for Finance and Technology (S151 Officer) **Nicole Wood**	2nd July 2020
Director, Legal and Assurance (Monitoring Officer) **Jacqueline Millward on behalf of Paul Turner**	30th June 2020