

CABINET

10 September 2014

SILVER HILL UPDATE

REPORT OF HEAD OF ESTATES

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RECENT REFERENCES:

CAB 2189 – St Clements Surgery – 15 June 2011

CAB 2272 – Silver Hill Update- 7 December 2011

EXECUTIVE SUMMARY:

The Report seeks approval to progress the design of the proposed new St Clements GP surgery in central Winchester to the next stage in the RIBA Plan of Work. This will enable the scheme to be tendered when the business case has been approved and will keep the project aligned to the delivery of the Silver Hill scheme. The Council will incur the cost of fees for the design work. If the project progresses to completion these will be rolled into the total project cost on which a return will be obtained. If the Silver Hill development does not proceed, the additional fees will be recoverable from Henderson under the Council's Indemnity for costs necessarily incurred under the CPO.

The Report also updates Members on, and seeks authority for the approval of, the proposed acquisition of the Friarsgate Medical Centre by Silverhill Winchester No 1 Ltd (SW1) from Silverhill Winchester No 2 Ltd (SW2).

Finally, the Report informs Members of the letter before action served on the Council by Solicitors acting for Cllr Gottlieb and identifies the costs which will be incurred by the Council in responding to this action.

RECOMMENDATIONS:

- 1 Cabinet approve a General Fund supplementary revenue estimate of £100,000, funded by a matching release from the Property Reserve (Asset Management Plan) in accordance with Financial Procedure Rule 7.3, in order to progress the design of the replacement St Clements's surgery.
- 2 In order to develop the conceptual designs they have produced for the new surgery, that a direction be made under Contract Procedure Rule 2.4 a) to authorise the Head of Estates to appoint Architecture PLB as Project Architects up to design stage 3 for Design & Build.
- 3 That a cost engineering exercise be undertaken with the Architects to make the design of the building more efficient with a view to reducing construction costs.
- 4 That the Head of Estates be authorised to appoint cost consultants to assess the cost of the revised design, progress the contract documentation to tender stage and to advise on the most appropriate form of contracting to use to secure the construction of the property.
- 5 That the Head of Estates be authorised to appoint M&E and Structural Engineers and such other consultants as are required to progress the design to enable a business case to be developed and (following approval of that) to help the cost consultant to develop the tender documentation.
- 6 That the Head of Estates be authorised to submit any necessary applications for planning consent arising from the revised design and other applications for works requiring statutory consent.
- 7 That the Head of Estates be authorised to appoint GVA Grimley to update the valuation of the proposed surgery, to advise on the letting to the St. Clements Practice and to conclude negotiations for the letting of the pharmacy to Lloyds Chemist.
- 8 That a detailed business case for the development of the new surgery be prepared once the revised design has been agreed, costed and valued, and submitted to Cabinet and Council for approval.
- 9 That subject to the development and approval by Cabinet and Council of a viable business case and the funding of the scheme:-
 - a) prior to the commencement of construction works, a building agreement and lease be entered into with the St. Clements Practice on terms to be agreed by the Head of Estates.
 - b) the new surgery be let to the St Clements Practice on terms to be approved by the Head of Estates.
 - c) the Head of Estates, in consultation with the Head of Legal and

Democratic Services, be authorised to select the procurement procedure to be used, determine the evaluation model to be used, and seek tenders for the construction of the property, taking account of the advice obtained from the Cost Consultant and complying with the Council's Contracts Procedure Rules;

d) That following the analysis of the tenders by the cost consultant, the Head of Estates be authorised to accept the lowest compliant tender, subject to this being within the cost assessment identified within the approved business case and subject to the tenderer being able to undertake the works within the required timescale.

- 10 Subject to the project proceeding, that the relocation of the Lloyds pharmacy to the new Surgery be approved on terms to be agreed by the Head of Estates.
- 11 That the terms set out in Exempt Appendix B for the acquisition by Silverhill Winchester No 1 Limited of the freehold of Friarsgate Medical Centre, Friarsgate, Winchester from Silverhill Winchester No 2 be approved.
- 12 That the estimated budget for the cost of dealing with the Judicial Review proceedings commenced by Cllr Gottlieb, as set out in paragraph 7.7 of the report, be noted, and that any costs which the Council incurs be paid from the Major Investment Reserve.

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DETAIL:

1 Introduction

- 1.1 The St Clement's Surgery is one of the buildings which is subject to the Council's Silver Hill Compulsory Purchase Order and needs to be acquired by the Council to enable the regeneration scheme to proceed.
- 1.2 Despite now being in a position to make a compulsory acquisition, the Council has always sought to achieve a relocation of the surgery by negotiation and has entered into a very constructive dialogue with the owners of the Surgery (the St. Clements Practice) to achieve this. As set out in CAB2189 (St. Clements Surgery, Winchester, 15 June 2011), it is proposed that the Council will construct a replacement surgery on the Upper Brook Street car park and lease the new building to the Practice, so that it can vacate the existing St. Clements Surgery.
- 1.3 This report updates Members of the progress that has been made with these negotiations, and seeks the necessary approvals to allow the project to continue.
- 1.4 The report also gives details for approval of a proposed transfer of the Friarsgate Medical Centre, another property within the Silver Hill scheme area, which is currently held by Silverhill Winchester No 2 Limited, and which is proposed to be transferred to Silverhill Winchester No 1 Limited, the developer of the Silver Hill scheme.
- 1.5 Finally, the report updates Members on a letter before action which has been received by the Council from solicitors acting for Cllr. Kim Gottlieb, who have been instructed to challenge the Cabinet's decision of 6 August 2014 to approve the variations to the scheme which were sought by the developer.

2 New Surgery Building

- 2.1 The preferred route for a replacement surgery remains the provision of a new building on the Upper Brook Street car park, which the Council has agreed in principle to release for this purpose (CAB2189 refers). A planning consent for the new surgery was obtained based on a design produced by Architecture PLB to a specification which meets the requirements of the NHS and allows some additional space for growth in patient numbers, which is likely to occur as a result of increased housing construction in the City.

- 2.2 Good progress has been made in agreeing the terms for a lease of the building to the St. Clements GP Practice. It has not yet been possible to agree a rent figure because, following changes to the way in which the NHS is organised, the Council is not able to negotiate directly with the parts of the NHS responsible for commissioning or paying for GP provision. The NHS will not discuss new property with the provider but will only negotiate via the contracting GP practice. Arrangements have been put in motion for that process to take place and it will be some weeks before a position is finalised. At present it is not certain that a viable rent figure can be achieved but everything possible is being done to achieve this.
- 2.3 A two stage approach is being adopted to ensure that the scheme can proceed. Firstly, negotiations are to be undertaken with the NHS by the Practice to seek funding on the basis of a higher rent than the reimbursement level previously approved by the NHS, and secondly that the design of the building is re-visited to try to reduce costs. By adopting this approach, it should be possible for the Council to produce a viable scheme.
- 2.4 A key consideration now is timing. If the Silver Hill scheme achieves a revised planning consent in the autumn and the Development Agreement between the Council and Henderson thereafter goes unconditional, work could start on site before the end of 2014. This would leave approximately a year for construction to be completed, before possession of the existing surgery would be required for the Silver Hill redevelopment.
- 2.5 The most appropriate method of procurement for this size of contract would be utilising a form of design and build contract. By their nature, surgeries require careful consideration of infection control and this requires more detailed design work to be undertaken before the construction work can be tendered. It is therefore necessary to proceed with the next stage of design to enable a detailed tender package to be assembled in a timely way. The more detailed design will enable cost consultants to produce an accurate assessment of the cost of the works to build into the business case, which will be needed to determine whether the Council can proceed to act as developer of the site. At the same time that these works are undertaken, a cost engineering exercise will be undertaken by the Architect, in conjunction with a cost consultant and other appropriate advisers such as M&E and Structural Engineers, to seek to reduce the overall development costs.
- 2.6 This has not been possible up until now because the Council has not had the comfort that any outlay on fees would be covered by the CPO Indemnity agreement with Henderson. Now that planning applications for the alterations to the overall Silver Hill redevelopment have been submitted, Henderson have agreed that the additional £100,000 in expenditure on fees proposed in this report would be covered by the existing CPO Indemnity which is in place between Henderson and the Council, subject to the Indemnity requirements that they consider are necessary and reasonable.
- 2.7 This does not mean that Henderson will pay the fees upfront. Henderson will only be liable for the fees if the Silver Hill scheme does not go unconditional (and provided also that the Council is not in breach of its obligations under the

Development Agreement). Thus, if the Council spends the money on the fees but the St. Clements Surgery project does not go ahead because the main Silver Hill scheme does not proceed, then the Council can reclaim the costs from Henderson. If the Council is in breach of the Development Agreement and causes the scheme to fail then the Indemnity does not apply.

- 2.8 If Silver Hill proceeds, or if the St. Clements Practice decide to go ahead with the Surgery project but the Silver Hill redevelopment does not go ahead, then the Surgery Scheme will have to fund the fees and other costs itself.
- 2.9 In order to develop the business case it will be necessary to extend the appointment of the Architects and Valuation advisers and to appoint cost consultants and other professional advisers to review the construction costs and procurement options. It is anticipated that the design and review work will require a budget of £100,000.
- 2.10 Following the cost engineering exercise, the cost of the project will be assessed by the cost consultant and the outcome will be incorporated into the valuation to determine whether a financially viable scheme can be produced. The rental value that is developed from these calculations will be put to the Agent acting for the St. Clements Practice who will discuss this with the NHS.
- 2.11 Once the business case has been prepared, it will be reported to Cabinet and Council to enable a decision to be made as to whether to proceed with the project. Funding for the project will be identified at that time...
- 2.12 Subject to a satisfactory business case being developed and approved, the Head of Estates will then be able to obtain tenders for the construction of the surgery. The Head of Estates, in consultation with the Head of Legal and Democratic Services, will determine the most appropriate mechanism by which competitive prices are obtained taking account of the benefits of the different procurement options which are available to the Council.
- 2.13 No decisions about whether to proceed will be taken before a detailed business case has been prepared and approved by Cabinet and Council, but it is not possible to produce the business case without undertaking the work set out in this report.
- 2.14 With the Silver Hill scheme now moving forward, this project is an opportunity to provide up to date GP facilities in the town centre for its residents

3 Relocation of Lloyds Pharmacy

- 3.1 The existing Lloyds Pharmacy on Silver Hill will also be acquired under the Silver Hill CPO and it is proposed to also relocate this onto the Upper Brook Street site, by providing a pharmacy as part of the Surgery project. Terms for the letting of the new pharmacy have been provisionally agreed with Lloyds, subject to formal Board approval, and the details of this proposed letting are set out in Exempt Appendix A. The letting will only proceed in the event of the Surgery scheme proceeding.

4 Friarsgate Medical Centre Acquisition

- 4.1 Members will be aware that the Council has an agreement with Silverhill Winchester No 1 Limited (backed by TIAA Henderson, its parent company) to redevelop the Silver Hill area. Under the terms of the Development Agreement and the associated CPO Indemnity Agreement, Silverhill Winchester No 1 limited, the developer, is required to negotiate and acquire land interests within the site, and then transfer such acquired interests to the City Council. The Council then leases the site to the developer, to allow the construction of the Silver Hill development to proceed, and the residential and retail units sold/leased to occupiers.
- 4.2 The development site includes the Friarsgate Medical Centre, which was purchased from the NHS by Thornfield, with a leaseback arrangement to the NHS who continued to provide some medical services from the building. The property was purchased by Henderson from the Administrators of Thornfield as an investment and is held by Henderson in a separate wholly-owned subsidiary company of Silverhill Winchester No 1 Limited, Silver Hill Winchester No 2 (SW 2).
- 4.3 Under the terms of the CPO Indemnity Agreement between Henderson and the Council, the Council's approval of the proposed terms of acquisition of a property within the CPO area is required before Silver Hill Winchester No 1 Limited (the developer) can acquire such property. In the case of the Friarsgate Medical Centre, the property is effectively held by a third party (albeit that that third party is owned by the same parent as the developer). If, as is now proposed in accordance with the scheme under the agreements with the Council, Silverhill Winchester No 1 Limited is to acquire the property, the terms of the acquisition need to be approved by the Council.
- 4.4 The proposed acquisition terms are in exempt Appendix B. Carter Jonas are the agents appointed to negotiate the terms of all property acquisitions for the scheme and these are conducted by a Partner of that practice. The Agent has a duty of care to the City Council in carrying out the negotiations which means that although they are instructed by the developer, they are liable to the Council for negligence in the same way as if they were instructed directly by it. The Head of Estates has reviewed the terms negotiated by Carter Jonas and has concluded that they should be approved. Members are therefore requested to accept the Agent's recommendations and approve the acquisition of the freehold of the property by Silver Hill Winchester No1 as set out in Exempt Appendix B.

5 Potential Judicial Review Proceedings Against The City Council

- 5.1 A letter has been received from solicitors acting for Cllr Kim Gottlieb, indicating an intention by Cllr Gottlieb to challenge the Cabinet's decision of 6 August 2014 to authorise variations to the approved Silver Hill development scheme. The letter (a "Pre-Action Protocol" letter) is a mandatory preliminary requirement before formal judicial proceedings can be issued to challenge a decision of the Council.

- 5.2 The Court Rules required the Council to respond to the Pre-Action Protocol letter by 1 September 2014, and a response has been sent, with advice having been sought from the Council's retained external advisers (Berwin Leighton Paisner LLP) and Leading Counsel.
- 5.3 The indicated grounds of the challenge are very similar to challenges made by the same firm (but on behalf of a different client) as part of the CPO confirmation process in the past. They assert that the Council should have undertaken a formal procurement exercise before varying the development agreement. It is also claimed that the Council has not obtained best consideration for the disposal of its land interests in the scheme. Finally, it is alleged that there may be state aid issues.
- 5.4 The Council's response has robustly refuted these claims. It is now for Cllr Gottlieb to consider whether to issue formal judicial review proceedings, to which the Council will then have to respond.
- 5.5 Details of the potential costs implications for the Council are set out in paragraph 7.7 below.

OTHER CONSIDERATIONS:

6 COMMUNITY STRATEGY AND PORTFOLIO PLANS (RELEVANCE TO):

- 6.1 The provision of high quality and well located primary health care facilities is relevant to the Active Communities, Prosperous Economy and High Quality Environment themes within the Community Strategy, and the Council's portfolio plans. The siting of a surgery in a central accessible location is particularly important in relation to access to services and the well being of older people and those on low incomes. The Silver Hill development itself is a key economic prosperity outcome specifically identified as a priority within the Economic Prosperity change plan.

7 RESOURCE IMPLICATIONS:

- 7.1 A one-off supplementary revenue estimate of £100,000 is proposed, which is to be funded by the Property Reserve (Asset Management Plan). Should the expenditure be recovered as planned then it is also proposed that the Property Reserve be replenished at the time of recovery.
- 7.2 Previous expenditure of £100,451 was incurred in relation to this project in 2011/12 and 2012/13. This was also funded by the Property Reserve.
- 7.3 The development of this project will be managed by the Head of Estates with input from Legal, Building Control, Planning Control, Finance and Historic Environment teams. Detailed advice will be required from the Architects and a range of professional consultants including M&E and Structural Engineers, Cost Consultants, Valuers and other specialist advisers.
- 7.4 At this stage, approvals are sought to allow a business case to be prepared. The business case will then be reviewed by Cabinet and Council, in order for

approval to be given by Members to the funding and expenditure for the project.

- 7.5 Expenditure on the design and planning process is an essential part of any construction project. The Council may not be reimbursed for this sum directly by a third party but any subsequent property transaction will take into account all the costs which have to be incurred and the financial outcome will reflect this. Since such a transaction cannot be guaranteed at this stage Cabinet should be advised that the expenditure may not be recovered and that this is at the Council's own risk.
- 7.6 The cost of the Friarsgate property acquisition will be met by the developer, as part of the development costs which will be reflected in the Silver Hill development account.
- 7.7 In terms of the legal challenge, cost estimates have been obtained for the legal advice and representation that would be required to defend the Council in any legal proceedings. These are estimated at c. £80,000 if the matter went to a two day trial, although they are likely to be less if the claim does not receive the necessary permission of the Court to proceed. The costs should be recoverable (provided they are reasonable) from the claimant if the Council is successful. If the Council were to lose the case, it would face having to pay the claimant's costs also. Detailed legal advice on the Council's case can be given in exempt business if required by Members.

8 RISK MANAGEMENT ISSUES

- 8.1 As noted above the expenditure for which approval is sought will result in an output which has a value only to the extent that it enables a project to take place. If that project does not proceed then the design and planning consent obtained are unlikely to have a significant value. However, the risk of not proceeding at this stage is that there will be a significant impact on the Silver Hill project to the disadvantage of the Council and the community at large. Creating certainty over primary health care provision in Winchester is a legitimate concern for the Council. If the project does come to fruition then the value of the Council's land holding will have been significantly enhanced and the opportunity to realise a value from the development created when this might otherwise not exist.
- 8.2 There is a risk that it is not possible to agree a rent for the Surgery which enables a viable business case for the development to be undertaken. This risk will be mitigated by the cost engineering work referred to in the report.
- 8.3 There is a risk that the telecommunications apparatus in the land has been laid outside of the consented route. This risk can be mitigated by working closely with the telecoms operator during the construction works.

BACKGROUND DOCUMENTS:

None

APPENDICES:

Exempt Appendix A - Proposed terms for the letting of the Pharmacy to Lloyds

Exempt Appendix B - Advice from Carter Jonas on the terms for the acquisition of Friarsgate Medical Centre.