

COUNCIL

18 June 2015

SILVER HILL: DEVELOPMENT AGREEMENT WITH SILVERHILL WINCHESTER  
No.1 LTD

REPORT OF THE LEADER

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RECENT REFERENCES:

CAB2665 – Silver Hill Judicial Review Decision , 3 March 2015

CAB2675 – Silver Hill Review of Project Position, 18 March 2015

CAB2688 – Silver Hill Notice of Motion from Council of 1 April 2015, 15 April 2015

CAB2695 - Silver Hill Update – Submission By Developer, 21 May 2015

EXECUTIVE SUMMARY:

This Extraordinary Meeting of Council has been called at the request of seven Members to discuss the termination of the Development Agreement signed on 22 December 2004 with Silverhill Winchester No.1 Ltd (then known as Thornfield Properties (Winchester) Ltd).

The question of termination is a decision for Cabinet, and the views of Council will be conveyed to the next appropriate meeting of Cabinet to allow them to consider the matter. This report summarises the issues raised by consideration of termination. It also outlines the legal background as set out in the Development Agreement.

RECOMMENDATION:

- 1 That Council considers that it is not in the best interests of Winchester for a notice of termination to be issued under the terms of the Development Agreement between the Council and Silverhill Winchester No.1 Ltd dated 22 December 2004, and that Cabinet be advised accordingly.

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### SILVER HILL: DEVELOPMENT AGREEMENT WITH SILVER HILL WINCHESTER No.1 LTD

#### REPORT OF THE LEADER

#### DETAIL:

- 1 Background: The Council's Legal Obligations
  - 1.1 When it signed the Development Agreement to take forward the Silver Hill scheme in 2004, the Council entered into a legal commitment to work with its co-signatory to achieve regeneration of this part of the City. Whilst the identity of that co-signatory has changed, and the Agreement is now with Silverhill Winchester No.1 Ltd (hereinafter SW1), those contractual obligations remain.
  - 1.2 Council recognised this in April when it passed a resolution concerning Silver Hill which began "While Council recognises that the City Council will continue to comply with its obligations and responsibilities under the Development Agreement...". The Council's external legal advice from Leading Counsel is that the Agreement remains a binding contract notwithstanding the recent Judicial Review decision. The advice from Nigel Giffin QC on this matter is attached at Appendix 1.
  - 1.3 To achieve regeneration in accordance with the Development Agreement planning consent for a mixed-use scheme was issued in February 2009. To remind members, it is helpful to summarise key elements of the 2009 Scheme, which SW1 now seek to bring forward, in conformity with the requirements of the Agreement:
    - a) 187 market homes
    - b) 100 affordable homes (20 available at social rent, 80 shared ownership)
    - c) 330 public parking spaces
    - d) 95,000 square feet of replacement retail space
    - e) A bus station
    - f) Improvements to the public realm, including rerouting of buses away from the lower High Street

- 1.4 Members will recall that the Council has also sought to replace the Doctors' Surgery on the site (St Clements Surgery) with upgraded facilities on the Upper Brook Street Car Park.
- 1.5 There are three relevant aspects of the Development Agreement to draw to Member's attention :
- a) The requirement that SW1 must satisfy three outstanding conditions concerning financial viability, funding and social housing before the Agreement goes unconditional – that is, both parties becoming legally committed to proceeding with the development;
  - b) Either party's ability to give notice to terminate the Agreement without penalty if the Agreement had not gone unconditional by 1 June 2015 (although as set out in this report, it does not follow that the Agreement will terminate at the end of the notice period); and
  - c) The necessity for some qualifying works on the site to have commenced by 1 June 2015. Works have been carried out and we have sought SW1's comment as to whether they consider those works satisfy the condition; if this requirement has not been met, it is open to the Council to issue a notice to terminate.
- 1.6 Members will be aware that SW1 have submitted information which they consider demonstrates that they will be able to satisfy the three conditions mentioned in (a) above. They will also know that a series of meetings have been set up for the week beginning 22 June 2015 to consider the Council's response to those submissions. Officers and the Council's advisors are currently assessing whether those submissions are indeed satisfactory, and so the conditions have been met, and will advise Members accordingly at those planned meetings.
- 1.7 The Agreement sets a 'long stop date', after which either party is free, if they so wish, to seek to terminate the agreement (by serving notice of termination) if it has not gone unconditional. By agreement, the Council and SW1 had set that date as 1 June 2015. The material SW1 have submitted to seek approvals from the Council in respect of the funding and social (affordable) housing conditions, and to satisfy the financial viability condition was not received in full by that date. Moreover, they have not submitted the relevant signed agreements on funding and affordable housing which are required to satisfy the conditions. On that basis, our external legal advisors, BLP, advise that the Council has the option to serve notice to terminate.
- 1.8 Members should also note that the Council has yet to receive SW1's assurance and evidence that the works commencement condition (see 1.5(c)) has been satisfied. If it has not the Council has the option to terminate.
- 1.9 If, having considered the advice in this report and the relevant risks, the Council wishes to recommend to Cabinet they seek to terminate the Agreement, and Cabinet accepts that advice, then we must issue a notice of

termination to SW1. The Council should have clear and defensible reasons as to why we seek a termination, consistent with the provisions of the Agreement. However, that does not lead to automatic termination. Where a notice of termination is issued, the Agreement allows SW1 20 working days to satisfy the outstanding conditions. In those circumstances information provided by SW1 must be assessed and, if it satisfies the outstanding conditions, the Agreement would go unconditional, notwithstanding the notice to terminate.

## 2 Background: The Case for Regeneration

- 2.1 The original reasons for the Silver Hill regeneration proposals being brought forward were to deal with the decay in this run-down part of the City. Our main focus should not be whether or not we personally find the scheme attractive, we must focus on what is best for Winchester.
- 2.2 In the eighteen years this project has been running, matters have got worse, culminating in the closure of Friarsgate car park earlier this year. There are other acknowledged challenges which the plans address. Medical provision in the centre of town is vital. Yet we have a Doctors' Surgery with GPs working from premises which are unfit for purpose, waiting with increasing impatience for the Council to reach a decision so they can plan their future. We know there is demand for retail space, and a threat that if it is not provided in our City Centre it will migrate to out-of-city locations. The Bus Station needs replacement, we need affordable housing, the first impression that visitors have of the city – whether arriving by bus or car – is very unfavourable. There is so much else to be done.
- 2.3 SW1's plans underwent thorough public and democratic scrutiny in gaining planning permission. If we as a Council are to agree that they are not right, then it is incumbent on us to say what the alternatives are, how long they will take to realise and whether they are deliverable. If the Council is to try and develop a 'Plan B' then that will take time, and will be controversial with some, perhaps many. If we are to deliver the changes that have been seen as essential parts of this scheme for the last 18 years, how different could a Plan B actually look, given that Winchester still needs the same things that it did when we wrote the Planning Brief in 2003?
- 2.4 The 2009 Scheme, which would be the one delivered if this Agreement goes unconditional, contains many good elements which the Council's original brief sought including retail space, affordable housing and the bus station. This respond to objections which were made to the revised 2014 scheme arguing that affordable housing and bus provision were inadequate. The scheme has architectural merit, having been designed by some of the best architects in the country. Assuming it can be shown to be viable, it offers a realistic solution to the challenges this area poses.
- 2.5 We should ask four simple questions of those who may argue we should seek to terminate this Agreement: tell us what they would put in its place that would also meet Winchester's future needs, when we could expect to see it happen,

how it would be funded, and why it would be better than what already has the approval of our Planning Committee.

### 3 Conclusions

- 3.1 The Council has always been clear that it intends to comply with the provisions of the Development Agreement, which remains a legally binding document. It is clear from the Agreement that, regardless of whether or not we issue a notice of termination, we are obliged to consider and reach a view on the information already submitted by SW1. If we consider it satisfies the conditions set out in the Agreement, then that Agreement will go unconditional, whether or not we have sought to terminate. The debate at this Extraordinary Meeting of Council should begin by asking what is right for Winchester. We should not dismiss the 2009 Scheme without considering what it offers and what our realistic alternatives are. The 2009 Scheme is what we asked for, and what our Planning Committee approved.
- 3.2 The recommendation urges the Council to confirm its support for delivery of so many improvements to Winchester that we have been working towards for so many years. If the 2009 scheme is viable, and that the other conditions within the Agreement have been met, then we should welcome the fact that, after so many years, we are closer to securing the regeneration of Silver Hill.

### OTHER CONSIDERATIONS:

#### 4 COMMUNITY STRATEGY AND PORTFOLIO PLANS (RELEVANCE TO):

- 4.1 The Winchester District Community Strategy seeks to promote economic prosperity and the provision of a mix of housing to meet demand. The relevant Portfolio Plans support the delivery of Silver Hill regeneration to achieve these aims.

#### 5 RESOURCE IMPLICATIONS:

- 5.1 The direct resource implications arising from non- termination of the agreement are: -
- a) A capital receipt of £0.7m, relating to the s106 agreement for the relocation of the CCTV service, becomes receivable when the Agreement goes unconditional,
  - b) A capital receipt of £5m relating to the Council's purchases of the King's Walk properties, would be receivable when the Agreement becomes unconditional. This would reduce the Council's capital financing requirement and the annual statutory revenue charge of £170k per annum. It would also reduce annual rental income, although such income would not have been sustainable in the long term.
  - c) The Council would have the option to purchase the car park in the scheme, if there was a financial case to do so,

- d) The Agreement provides for the Council to receive an annual revenue income and for a share of any “super profits” through an overage calculation,
- e) It would be expected that business rates receivable and Council tax would see beneficial growth, and
- f) The costs of any alternative development route, in the absence of the 2009 scheme progressing, would be avoided.

## 6 RISK MANAGEMENT ISSUES

6.1 Should Cabinet decide, in the light of a recommendation by Council, that they wish to seek to terminate the agreement the following risks arise:

- a) the likelihood of a legal challenge and associated costs should the case be lost if the Council fails to comply with its legal obligations under the Development Agreement;
- b) the financial implications of the site remaining unimproved for sometime, notably maintenance costs and reduced rental or business rate income ;
- c) the significant financial implications of having to secure alternative proposals and a developer willing to implement them.
- d) a delay in proceeding with regeneration which offers new retail provision opens up the possibility that developers will seek permission to satisfy unmet demand by edge or out of town development; and
- e) the impact on the Council's reputation in the development community if it is not seen as willing to support and promote town centre regeneration.

6.2 There is also a risk of public protest and legal challenge from those who object to Silver Hill regeneration in its current form should the 2009 scheme progress, with associated costs for the Council.

### BACKGROUND DOCUMENTS:

Redacted Development Agreement between Winchester City Council and Silverhill Winchester No.1 Ltd, dated 22 December 2004

### APPENDICES:

Appendix 1 – Legal Opinion from Nigel Giffin QC 15 May 2015

## WINCHESTER CITY COUNCIL: SILVER HILL DEVELOPMENT

### OPINION

1. I am instructed to advise Winchester City Council (“the Council”) in relation to the Council’s December 2004 development agreement with Thornfield Properties (Winchester) Limited, now known as Silverhill (Winchester) No 1 Ltd, and to whom I shall refer as “the Developer”. I have advised on a number of previous occasions, before and since the recent judicial review proceedings, and I do not propose to repeat the background here.
2. The Council’s decision to agree to certain variations to the development agreement, reached during 2014, was quashed in the judicial review proceedings. Subject to the possibility that the appeal being pursued by the Developer may succeed, the effect of that is, on its face, simply to leave the development agreement as it stood prior to that decision – that is to say, as it was concluded in 2004 subject to the variations made between 2009 and 2014.
3. However, the judgment of Lang J in the judicial review proceedings noted that (as is almost certainly the case, and as the Council effectively conceded during the judicial review) the development agreement was not the subject of a competitive procurement in the first place, when it ought to have been. That is because it amounted to a public works contract, although that was apparently not recognised at the time (which may not have been particularly surprising in the then somewhat unclear state of the law). So the Council will, in 2004, have acted in breach of what were then the Public Works Contracts Regulations 1991.



4. The question which has been raised is whether that may mean that the development agreement is now void and/or unenforceable. In my view that is not the case, for the reasons which follow.
5. First, a breach of the public procurement legislation does not, as such, invalidate the resulting contract. There are specific remedies available under the procurement legislation. The decision to enter a contract may be set aside, or the authority may be restrained from doing so – but only if the contract has not yet been concluded. Once it has been, the only remedy that may be awarded is damages. There is also now (though not in 2004) a remedy called the declaration of ineffectiveness, which in limited circumstances requires a concluded contract to be declared ineffective for the future – but quite apart from the fact that that remedy did not exist in 2004, it has to be sought within 6 months of the contract being concluded, so it would be far too late to do so now. The latest procurement legislation, introduced in 2015, provides for the authority to have implied rights to terminate unlawfully procured contracts in certain circumstances, but those new provisions do not apply to existing contracts. Not only does the legislation not provide for automatic invalidity, the particular provision which it makes for the position of concluded contracts is in my view inconsistent with any such consequence.
6. Secondly, it is right to say that the Court of Appeal in *R (Chandler) v Secretary of State for Children, Schools and Families* [2010] LGR 1 held that a breach of the Public Contracts Regulations also amounted to a breach of the authority's domestic public law obligations, capable in principle of being challenged in judicial review proceedings – because it amounted to a failure to comply with a statutory obligation.
7. However, seeking to analyse the matter in terms of domestic public law does not seem to me to change the conclusion. It is inconceivable that permission would now be given, so long after the event, to challenge the original development agreement in judicial review proceedings. There was

debate for many years as to whether a contract concluded in breach of public law obligations would as a result be treated as void and unenforceable in private law. However, short at any rate of the Supreme Court, that debate has been concluded by the decision of the Court of Appeal in *Charles Terence Estates Ltd v Cornwall Council* [2013] 1 WLR 466. The judgment makes it clear that such consequences normally only follow if the contract is outside the capacity of the statutory body concerned, i.e. it is a contract of a kind which it simply has no power to make. That was plainly not the case here. The Council did have capacity to enter into a development agreement of this nature – it simply failed to follow a required procedure before doing so.

8. *Charles Terence* does suggest, by analogy with the approach in *Rolled Steel Products (Holdings) Ltd v British Steel Corporation* [1986] Ch 246, that a contract entered into in excess or abuse of the body's powers may not be enforceable against it (even though within the body's capacity) by a party having notice of the invalidity. However, I do not think that this qualification is relevant in the present context. Where the unlawfulness results solely from the breach of a particular statutory regime, and where that regime prescribes its own system of remedies, which do not include the invalidity of a concluded contract, my view is that enforceability in private law must go hand in hand with that regime.
9. Even if I was wrong about that, it is debateable whether the Developer could be said to have had the requisite notice here. It is presumably safe to assume that the Developer was aware in 2004 that there had been no procurement in accordance with the Public Works Contracts Regulations 1991, but I am not aware of any reason to suppose that the Developer would have appreciated that the development agreement was a public works contract that needed to be procured. Although ignorance of the law may not always fall to be taken into account, the *Rolled Steel* doctrine is really one of good faith and when a party's conscience should be held to

be affected. Given the general lack of enthusiasm which the Court of Appeal in *Charles Terence* showed for local authorities being able to walk away from their contracts by relying upon their own unlawful actions, I find it very hard to believe that a contract would be held unenforceable merely because the counterparty did not appreciate at the time how the procurement legislation worked.

## CONCLUSIONS

10. In my view, the fact that entry into the development agreement in 2004 may have been in breach of the Public Works Contracts Regulations 1991 does not render the development agreement void or unenforceable now.

NIGEL GIFFIN QC

11KBW

15 May 2015

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IN THE MATTER OF  
WINCHESTER C.C.

AND IN THE MATTER OF THE  
SILVER HILL DEVELOPMENT

OPINION

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