OS104
FOR DECISION
WARD(S): ST. BARTHOLOMEW

THE OVERVIEW AND SCRUNITY COMMITTEE

7 July 2014

SILVER HILL DEVELOPMENT PROPOSAL

REPORT OF CLLR KIM GOTTLEIB

RECENT REFERENCES:

CAB 2603 – Silver Hill Regeneration, Cabinet 10 July 2014

EXECUTIVE SUMMARY:

Under Overview and Scrutiny Procedure Rule 13, Cllr Gottleib asked to place a report on this agenda under the Councillor Call for Action provisions.

Although the report was only left with in the Council Offices in paper form on Saturday 6 July 2014, the Chairman of The Overview and Scrutiny Committee has agreed to accept Cllr Gottleib's report, subject to the qualification raised below.

Previously, the Chairman of The Overview and Scrutiny Committee had advised Cllr Gottleib that he would be prepared to accept a late report, because of the Cabinet report that is elsewhere on this agenda. However, he advised Cllr Gottleib that anything submitted would need to be reviewed by officers as to what could be published in open session.

Given the short time available, the Head of Legal and Democratic Services has reviewed Cllr Gottleib's covering report and redacted any exempt information relating to detailed financial matters and other exempt information, and a copy of the redacted material is attached as Appendix A.

The report also included a number of emails as appendices. It was not possible to review these for publication in the time available, and so these are not attached.

RECOMMENDATIONS:

1 That The Overview and Scrutiny consider the points raised by Cllr Gottleib in open session, and, if needed, in exempt session, and determine whether to raise any matters with Cabinet or Council.

BACKGROUND DOCUMENTS:

Not applicable

APPENDICES:

Redacted Report by Cllr Gottelib

The Silver Hill development proposal

A report to the Overview & Scrutiny Committee

Cllr Kim A Gottlieb

4th July 2014

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INTRODUCTION

The purpose of this document is to inform O & S about the process that has been undertaken by the Council for this project which, in my view as someone with professional experience and who was a member of a Reference Group tasked to consider this project, is profoundly flawed.

The flaws in the process are wide-ranging and fundamental, and the result of them will be not only a scheme that will cause great damage to the historic character and economic vitality of the city, but will also make Best Consideration, which is one of the main legal and financial objectives the Council has a duty to achieve, impossible to attain.

It is being said that the current proposal is the product of a process that has taken many years. This claim is misleading. For all practical purposes we are only just now seeing a substantially new proposal, with new drawings and new financial arrangements including a wholly new offer in respect of affordable housing, only revealed within the last few weeks.

It is being said that to the extent that there are any outstanding issues, that these can be resolved as part of the planning process. This again is misleading. Up to the moment the Council agrees to allow the developer to submit a planning application it enjoys a very strong negotiating position.

After that moment, the Council's negotiating strength and ability to influence and direct change is almost entirely lost, and gone with it any chance the Council still has to improve or change the scheme or to ensure that Best Consideration is achieved. It would be irresponsible to ignore this fact.

There can be no doubt that this is the most important development project in Winchester's modern history, with impacts, that will eclipse Barton Farm, RPLC and all other current schemes rolled into one. There can be no doubt also that the integrity of the processes behind the project must be irrefutable and unquestionably lead to the attainment of Best Consideration.

O & S is asked to give careful consideration to what is described in this document. The claims and statements made are all supported by emails and records, which can be presented if and when required. It is hoped that O & S will recognise the seriousness of the flaws in the process.

It is then hoped that O & S will advise Cabinet that the process has indeed been unsatisfactory and unacceptable, and that neither it (Cabinet) nor Full Council should make any further decisions until a full investigation has been carried out, with the benefit of a team of new, independent advisors, the appointment of which should perhaps be referred to a reconstituted and expanded Reference Group.

In the context of a regeneration project that has taken many years to get close to being started, and in the context of the significance of the project, a few more weeks or even months properly considering all the details of this new proposal should make no difference from a time perspective, but may then give the process the robustness and integrity it has so far sorely missed.

BACKGROUND

The background will be well known to most Members but I would summarise it as follows.

Although the regeneration of this site had become an issue some years beforehand, the history of the current proposal began in July 2003 when a Planning Brief was issued by the Council. There was no open marketing exercise but the Council entered into an Exclusivity Agreement in March 2003 and then a Development Agreement with Thornfield Properties (Winchester) Ltd in December 2004.

There is a question to be answered about why the Council entered into an Exclusivity Agreement with Thornfield three months before the Planning Brief was issued, and before the Developer Brief was issued but that is not something I consider in this document.

In 2007 the Council resolved to grant planning permission for a scheme to contain: retail, office, private and social residential uses, a medical surgery, a private and a public car park, and a bus station. Amendments were made in 2008, and planning permission was issued in January 2009 when the Section 106 Agreement was completed.

Thornfield Properties PLC, the parent company, fell into financial difficulty and was put into Administration In January 2010. In December 2010, the subsidiary Thornfield company was acquired by Henderson UK Property Fund. To acquire the parts of the site not already owned by the Council or the developer, a CPO Inquiry was held in June 2012, and the Order was confirmed in March 2013.

Shortly after the Order was confirmed, an informal cross-party Reference Group was set up by the then Leader, Cllr Keith Wood, to include himself, myself and Cllrs Humby, Godfrey, Learnie and Pines. Its purpose was to review the scheme as was then proposed and any amendments Henderson might ask for. For the last few meetings, which tended to occur monthly, the group was joined by other members of Cabinet including Cllrs Weston, Warwick, Miller and Coates.

The group always had officers in attendance including, usually the Chief Executive ("CX") Simon Eden, Steve Tilbury and Andy Hickman. On occasions the meetings were attended by Henderson and their advisors. The last meeting of the Reference Group was held on 14th May 2014, the present Leader declined to reform it after the May elections.

Henderson have now indicated what changes they would like to make to the consented scheme, and are presently seeking the permission of the Council (acting as landowner) in accordance with the Development Agreement, to amend the scheme and to submit a planning application. The determination of that application/s is a separate function of the Council.

I would add that midway through these events the UK Public Contracts Regulations (2006) came into force and that, presently, it is anticipated that Henderson's request will be considered by the Cabinet which is scheduled to meet on Thursday 10th July.

Reference should be made to material within the Appendix for the period from 22nd June 2011, not long after I became a Councillor, to 8th May 2013, a short while after the first meeting of the Silver Hill Reference Group.

This material is only a small part of the exchanges I had with both Members and officers over this period and, with the benefit of hindsight, it seems to make clear that the Council fully understood and was concerned that any material changes made to the scheme would necessitate changes to the Development Agreement and, potentially, trigger a re-procurement process.

It indicates that prior to the CPO Inquiry, potential changes to the scheme and questions over the Bus Station were common currency.

It suggests that if there were to be material changes made to the scheme, ie anything beyond a bit of tweaking here or there, they would not be presented to and considered by the Council until after the CPO Inquiry.

The concern raised by all this material is that it points to a process that was being inappropriately constrained, primarily to avoid the CPO Inquiry being derailed. In this context there was no purpose other than Members being given to believe, as much by implication than anything else, that it was all a 'done deal' and that there was no scope for further negotiation.

The fundamental point is that, in the absence of a comprehensive and transparent examination of all the possibilities presented by the prospect of the scheme being changed by the developer, the Council could not possibly know that Best Consideration was being achieved.

There are also questions about what the Council did or didn't know or have expectations of, prior to the CPO Inquiry, and whether its conduct met all the standards expected of it, which warrant full investigation by the Overview and Scrutiny Committee.

The approach taken by the Council prior to the CPO Inquiry and the constraints placed upon the process did, in my view, set the tone for approach taken after the Inquiry and continue to obstruct the attainment of Best Consideration and the optimum regeneration of this strategic site.

DEVELOPMENT APPRAISAL

A development appraisal is to a developer like a stethoscope is to a doctor or a spanner to a mechanic. It is the most basic tool of the trade, and without one no proper diagnosis of where we are or where we've been, or where we might be going to next can be undertaken. The job can't be done without them.

A development appraisal is simply a means of looking at the flow of monies, rents and sales coming in, land and construction costs and fees going out – the bottom line is the resultant profit or loss. Developers use either industry software or their own customised spreadsheets, which when you change a sale price or any cost item, automatically adjust the bottom line to show the effect of the change made. They are also time sensitive so that you can see the cost of interest and again, for example, if you extend the construction period or the time you anticipate it will take to let the shops, you can seen the effect on the bottom line.

In this project, under the terms of the Development Agreement, the developer has an obligation to keep the Council "fully informed" and to "provide such information and assistance as may reasonably be required".

I frequently asked to see development appraisals throughout the whole process, including before the tenure of the Reference Group, and the way in which the Council failed to secure such information for it to be considered and interrogated by all officers and Members who should have had access to it, is a major flaw in the whole process.

This flaw indicates that the Council lacked the requisite experience and competence in the management of the project. The point is that development appraisals are not just something you produce at the end of any particular stage of work, they are something that are needed at the outset to inform and to guide the process ahead. This did not happen.

I eventually got to see a development appraisal on 5th July 2013 in what was in a Development Appraisal Review produced by Drivers Jonas Deloitte ("DJD") in November 2011. In the Review they helpfully compare one appraisal by Thornfield in April 2008 with another by Henderson in June 2011. I am aware that, at that time (July 2013) senior officers and Members dealing with financial matters for the Council still hadn't received a copy of the Review themselves.

In its introduction DJD say that "we have not had sight of the current Development Agreement". So whilst they could consider matters in the context of the market generally or from what they knew of the scheme previously, they could not have known all the relevant facts at the relevant time.

In the body of their Review DJD ask lots of questions. In relation to a "Development Management Fee" they say "the justification for this requires further explanation from Henderson". In relation to "Finance" DJD say "the Henderson funding costs appear high and further detailed information should be sought to enable a proper interrogation of its assumptions".

In its Summary, DJD outline a number of points that the "Council should monitor particularly closely". It also says "the appraisal reviewed within this report reflects Henderson's first attempt" and "we therefore expect the appraisal to be refined as part of an ongoing iterative review process with the Council".

This did not happen. The questions asked by DJD were left unanswered and the iterative appraisal process was not started. When, in July 2013, I asked for the exchanges between the Council and DJD following their November 2011 review, I was advised that "there weren't any exchanges".

This response poses serious questions about competence and the information required and due to be provided under the Development Agreement.

Sight of the DJD Review prompted me to question 1) the Management Fee [redacted] which was excluded from the next appraisal, 2) the interest being charged by Henderson [redacted] which is now being addressed by the Director of Estates and the PH, and 3) the carrying forward by Henderson of historic costs (up to [redacted]) incurred by Thornfield, which is now being investigated by the Director of Finance. Item 3) is further examined in a section that follows entitled 'The Missing Money'.

If I had not asked these questions myself it is quite possible, I believe almost certain, that they never would have been asked. I would also maintain that I did not complete the task, and that it is still very likely that there are other financial matters that are yet to be forensically interrogated.

The next time I saw an appraisal was on 15th October 2013 at the offices of DJD – the appraisal was dated August 2013. Apparently, there was a opinion – wholly incorrect in my view – that documents held at the City Offices were 'FOIAble' whereas documents held off site might not be. As is explained in correspondence in the Appendix, the work done by DJD at the time was incomplete, the general attitude being that there was little point in doing so as the scheme was about to be changed.

Of particular note is the profit margin which was given at [redacted]

I explained that we needed to know exactly what the then current position was so that we could, at the very least, assess what the financial implications might be, good or bad, of any changes made to the scheme. This advice was ignored by the Council, and again this poses questions as regards competence and the appropriate pursuit of Best Consideration by the Council.

I would reiterate that the point being missed by the Council was that development appraisals are needed to inform the processes that lie ahead. A development appraisal is an essential proactive tool which also facilitates sensitivity analysis.

This sort of analysis was needed because the moment Henderson indicated that it wanted to make changes to the scheme beyond 'minor changes' – removing the bus station cannot be regarded as a minor change – the Council was in a strong position to negotiate and to request changes to the scheme of its own.

The Council could, for example, have asked to see what the financial effects might have been if the size of the public car park was increased, or if the volume of affordable housing or the size of the civic amenity space was increased, or the amount of retail space reduced or the scale of the whole scheme reduced. The Council could even have considered if the Brooks could be included in a larger more comprehensive regeneration scheme. [redacted]

None of this type of exploration was ever carried out by the Council itself or by any consultant, or by Henderson responding to requests from the Council, so it is impossible to know if Best Consideration was ever achieved, either in financial terms or in any 'in kind' regeneration terms.

The next time I or the Reference Group viewed a development appraisal was at the Group meeting on 14th May 2014. This was several months after the previous occasion it viewed an appraisal.

Of particular note is the profit margin which was given (again) at [redacted]

My difficulty with this profit margin figure, which is the same as the figure given in August 2013, is that it was produced after the scheme was amended to 1) exclude the cost of the bus station and the medical surgery, 2) include the value of an additional 40,000+ square feet of retail space, 3) exclude the cost/value of the affordable housing, 4) include the enhanced value of the private residential accommodation, and 5) include the amendments to the private and public car parks.

For the profit margin in the August 2013 appraisal and in the May 2014 appraisal, before and after substantial changes were made to the scheme, to be identical is not plausible.

Nor is it acceptable or competent for the Council to regard the May 2014 appraisal as a negotiating position, which may or may not be adjusted by further discussion with the developer and subsequent interrogation of the figures. The developer has an obligation to provide information at all times that is as accurate as they can reasonably produce – this was not an occasion at which to negotiate.

In summary then, by virtue of 1) the fact that the Council failed to follow up on advice received by its advisor (DJD) in November 2011, 2) the fact that it failed to obtain development appraisals on a suitably regular basis, 3) the fact that it failed to carry out any kind of sensitivity analysis or any exploration of the effects of different volumes of the constituent parts, and 4) there being no market testing of new scheme, it becomes clear that it is quite impossible for the Council to confirm that Best Consideration had been attained.

It should be noted that even at the time of the exhibition in late March, when the amended scheme was put into the public domain, the Council had no information regarding the financial implications of those amendments and no idea if those amendments reflected Best Consideration.

THE 'MISSING MONEY'

When I first saw the DJD November 2011 Review on 5th July 2013 one of the things that struck me was the similar nature of the "Site Acquisition Costs" – there was barely 1% difference between the Thornfield April 2008 figure and the Henderson June 2011 figure.

This seemed odd enough to require further investigation, because in numerous earlier conversations with Members, officers and the developer it had been mentioned that the previous developer, Thornfield, had apparently incurred in the order of [redacted] worth of costs.

Knowing as result of my earlier conversations with the Administrators, that Thornfield's debt to HBoS, also circa [redacted], had been entirely written off and that Henderson's cost of acquiring the Thornfield subsidiary was only [redacted], I was expecting to see a commensurate reduction in Henderson's site acquisition costs.

The significance of the issue is that under the terms of the Development Agreement, the Council is set to enjoy a share of the profit. In theory (and in practice when the development is completed) a reduction in the profit as a result of an 'historic cost' **could equate to a loss to the Council of** [redacted] (or [redacted]

I explained all this to the Reference Group but was immediately told by officers that I didn't know what I was talking about and that my claim was "irrelevant". The position put to me was that the developer (the same company but when owned by Thornfield) had spent the money at some time and that was all that mattered.

Given that at that meeting I was the only person present with relevant experience and professional qualifications, an appropriate response would have been that the possibility of such a significant potential loss should be thoroughly investigated. That approach was not taken.

I continued to express my concerns, writing to the Leader and having many conversations with other Members in subsequent weeks.

On 5th September, the Reference Group received a note from Steve Tilbury [see Appendix] saying that he had sought advice from external solicitors, Berwin Leighton Paisner to the effect that it was acceptable for Henderson to claim the benefit of these historic costs. The note was presented to Members as the "definitive answer".

I did not regard this as correct or pertinent advice or anything like the definitive answer to the matter for several different reasons.

First and foremost, I did not think it appropriate that the person responsible for managing the project should be the person to conduct the investigation into any kind of potential loss. By allowing this to occur the Council failed to carry out an important enquiry in a robust manner with appropriate

integrity. At the very least, the investigation should have been conducted by the Director of Legal Services and/or the Director of Finance, but they were not involved.

Secondly, the advice one receives from any consultant is entirely dependent upon the questions being asked and/or the remit given. In this instance, in my view, the question posed lacked impartiality and was leading.

It is also the case there are a many other questions that could have been asked at the time but were not, the first obvious one being that "even if this is technically correct from an accountancy/legal perspective is there any way in which the Council can benefit from the [redacted] write off by HBoS?". In my view, the enquiry should have been far more expansive and directed in a commercial manner from the perspective of the Council's financial interests.

Thirdly, the approach taken by the Council is completely out of step with what would occur in the commercial world, and there is no justification for the Council to behave any differently.

A fundamental requirement in any property development partnership, as in every other kind of business partnership, is a need for transparency, honesty and fairness. Without these basic doctrines no partnership would survive.

As a breed, developers are simple straightforward folk and in the face of any such complexity would have gone back to basics. A basic rule in development partnerships is that you can't claim what you haven't paid for and, in the given circumstances, it would be considered wholly unacceptable to seek any advantage because of any accountancy quirk or personal situation. In the absence of any pre-arranged and explicit agreement there is no reason why the Council should behave any differently.

What should have occurred at the time Henderson acquired their interest in December 2010, is a full assessment of all the financial implications of the transaction from the Council's perspective, bearing in mind that in the case of any distressed sale (by the bank itself in this instance) no-one ever pays a £1 for a £1. My understanding is that no such assessment was carried out.

If such an assessment had been carried out, and it was found that an anomaly existed whereby Henderson could potentially claim the benefit of historic costs that they had not incurred themselves, then the matter should have been further investigated and clarified at the time. A Deed of Variation to the Development Agreement could have been insisted upon, and secured in the same way as a number of other Variations were secured.

In December 2010, Henderson would have been content to acknowledge that they could only fairly claim what they had actually expended, and in return for clarity on the historic costs, the Council might possibly have let them claim the cost of the shares in Thornfield, even though these would not normally have been regarded as qualifying development costs.

Even now this would be a reasonable approach to take although, at the time of writing, I understand that Henderson have not yet agreed to not claim any historic costs.

This whole matter and the approaches taken at various stages by the Council, all endorse the plain fact that Best Consideration is not being achieved.

The situation is not completely beyond repair. However, to correct the situation **the Council needs to retain the "absolute discretion"** it enjoys today, and will continue to enjoy only for so long as it holds back its decision (as it is lawfully entitled to do) to allow Henderson to submit a planning application.

ABSOLUTE DISCRETION
(and other advice)

A key feature in the debate in recent weeks is the "absolution discretion" the Council enjoys by virtue of Section 5 of the Development Agreement, as regards how it is obliged to respond to changes that the developer wants to make to the consented scheme.

The matter came to prominence when CX wrote to the Reference Group and senior officers on 5th December 2013, to advise of the Terms of Reference being issued to the 'independent' architect being appointed by the Council to advise on architectural issues.

In the Terms he wrote "the City Council is working with Henderson and will consider their proposals for changes to the scheme. The Development Agreement requires we give consent to changes, which should not be "unreasonably withheld"".

On 9th December I wrote to the CX to say that his earlier advice was incorrect and that Section 5 of the Development Agreement actually gives the Council "absolute discretion" as to how it might respond to requests by the developer to change the scheme consented in 2009.

In terms of contract conditionality, the difference between "absolute discretion" and "not being able to unreasonably withhold" is like chalk and cheese. For the purpose of negotiation "absolute discretion" gives the Council far, far greater strength, and a degree of control over events which the 'not to unreasonably withhold' condition comes nowhere close to.

In short, under one condition the Council can say "no" and give no reason for saying that, whilst under the other it would have to fully justify why it has said "no".

Instead of acknowledging this error, an understandable one given the use of "not to unreasonably withhold" elsewhere in the Development Agreement, the CX wrote to say "I was making a wider point, not seeking to quote from the DA. The concept of reasonable behaviour by both parties runs through the whole agreement".

Quoting from the Development Agreement is exactly what he was purporting to do, and I wrote back to him to say that his subsequent advice was "misleading" and that these were specific legal matters in which sweeping generalisations were unhelpful and irrelevant.

Thereafter we continued the 'debate' via email, some of which is included within the Appendix with neither side giving ground. The CX is of course highly regarded and his advice, which I still consider to be misleading, has permeated all the Council's thinking and actions since.

The problem is, in my view, that the CX's advice undermines the Council's ability to effectively exert pressure upon the developer, so that it can improve the scheme in whichever way, and in order to resolve a number of outstanding issues which include a number of significant financial ones.

The crucial point is that the Development Agreement is so drafted that the moment the Council (acting as landowner only) accepts in principle the changes the developer wants to make to the scheme and agrees to let it submit a planning application, the Council loses its "absolute discretion". The legal and commercial reality is that at that point in time, the Council will lose virtually all the negotiating strength it presently has.

To this day, Members are still not getting the information they need about this significance of this decision, and nowhere in any of the recent communications from the Council or the Leader's office is the critical nature of the decision that is scheduled to be made on July 10th, by the Cabinet only, properly explained. In my view, there is a pretence that everything that is outstanding or needs further consideration, can be left to the planning process.

The fact that Members both inside and outside of the Cabinet are not being properly advised, and the fact that the public too is being misled, is a major flaw in the process.

This is not, unfortunately, the only occasion that Members are not being fully advised about a significant matter.

When the Reference Group saw the development appraisal on May 14th with the profit margin at [redacted], it was on the basis of a value attributed to the car park of [redacted], whereas the Council is in a position to purchase the same for [redacted]

The effect of this, in my view, was the developer might be in a position where, according to its own figures, it would be unable to satisfy the Financial Viability Condition within the Development Agreement, and the Council might be in a position where it could rescind the contract.

Members of the Reference Group which, by this time, also included the remaining Members of Cabinet, were not advised of this possibility. It might not be advice that Members want to hear but there was no reason for them not to receive it.

The same occurred at the recent Members' briefing on 18th June, when the developer made clear that it could only achieve a profit of [redacted] on the basis that no affordable housing would be committed to the outset. Again this indicates that if it met its affordable housing commitment, the developer would be unable to satisfy the Financial Viability Condition and the possibility of rescission arises. Again, Members were not advised of this possibility.

If the Council is to achieve Best Consideration then it has to take a clear minded and commercial approach to all such matters, and if it is not being properly and fully advised it is impossible to attain Best Consideration.

The inclusion of Affordable Housing, in various forms, was and still remains a key objective of the development from the Council's perspective.

What is set out in the Development Agreement of 2004 is that the developer is obliged to provide "a minimum of 364 residential units 35% of which are Affordable Housing and 15% of the Affordable Housing or if greater 20 such units to be Social Rented Housing". There was an adjustment made in 2006 but the Section 106 Agreement completed in January 2009 retained a 35% provision which it equated to **100 Affordable Housing Units**. This reflects the current contractual position.

When it became known that the developer wanted to change the scheme, the issue of affordable housing was raised on numerous occasions in the Reference Group meetings, but there was never any detailed proposal put before the Group.

At one meeting in the latter half of 2013, there was a suggestion that the developer could use the Middle Brook Street car park to locate all the affordable housing units. The idea had been discussed between the developer and officers, and it seemed that officers were in support of the idea.

It was however roundly rejected by all Members for various reasons including, 1) its continued requirement as a car park, 2) the Council might itself have other ideas for the future development of the site, and 3) the developer should try to find its own off-site site and not try to 'borrow' ours.

In all subsequent meetings the issue of affordable housing was raised but the Group was never provided with any detail of any proposal for affordable housing, though it was frequently mooted by the developer and by officers that it was all "very tight" and "financially unviable".

The first time any specific proposal was made was at the last Reference Group on 14th May 2014, the details of which were outlined in a development appraisal – the first one we'd seen in many months. Members were allowed to look it at but not to have a copy, apparently at the developer's request.

What that appraisal showed was that, out of a total of 180 units proposed, only 14 would be affordable. This equated to a provision of 7% or 6% if measured on an area basis. None of the Members present thought that this was acceptable, but it was generally left that as there would be further discussion between officers and the developer about the appraisal, which no-one at the meeting thought was credible, the figure for affordable housing would naturally rise.

However, when the matter was revisited at the Members' Briefing on 18th June, instead of the affordable contribution rising, as was expected, it was lowered to an effective starting point of zero.

Members were told that a "mechanism" would be agreed ("would be" not "had been") between officers and the developer, on the basis that as 'values' rose during the course of the development a contribution to off site affordable housing could be made.

The basis of the mechanism was not explained. What, for example, was the period assumed over which the values (which values?) might rise, bearing in mind that residential developments are often sold off-plan (ie before built) and retail developments are often pre-let and forward-funded (ie also, in effect, sold before built).

The conditions that would need to be incorporated into any contract would be immensely complex and need to ensure all transactions being third-party, and that the costs which might also rise and, I assume, be offset against rising values be very carefully monitored.

In a recent email to Members the Leader has said that the affordable contribution "will grow if and when profit on the scheme grows". Relating the contribution to a growth in value is not the same as relating it to a growth in profit. They are not the same, so which is it? Has anything been drafted or agreed?

Such mechanisms are a relatively new innovation which, in rare and exceptional circumstances, may be an appropriate way for the Council to secure an affordable contribution though, as I understand it, there is little evidence to confirm it actually works. It must also be borne in mind that every situation will have its own set of circumstances so it would be difficult to devise a one mechanism 'fits all'.

In any event, I would respectfully suggest that the idea that this might be a reasonable approach on a site that is owned by the Council is outrageous. It flies in the face of government acting, and being seen to act, in a responsible and even handed way.

When this Council routinely asks builders of even the smallest scale residential developments for a contribution of £50,000 per dwelling, how fair is it for the Council to adopt a 'let's start with zero and see how we go' approach?

It would be wrong enough if the Council did this on any new proposal on its own land, but this is not a new proposal. There is an existing contractual commitment whereby the developer is obliged to deliver **100 affordable homes. This commitment will be completely surrendered** if the Cabinet decides on 10th July to accept (as landowner) the developer's proposed amendments.

Why is the Council not today asking for a contribution of £5m (100 units x £50,000)? How can a 'build now, perhaps pay later' approach ensure the attainment of Best Consideration?

Why is the Overview and Scrutiny Committee not asking how this situation could have arisen, bearing in mind that in June 2012 senior officers of the Council presented evidence to the Secretary of State's Planning Inspector on the basis that a 35% affordable housing provision was indeed financially viable at the time.

Two years later the scheme has been amended so that there are less costs, as a result of the exclusion of the bus station and the medical surgery, there is more value, as a result of a substantial increase in the retail accommodation, and still, in spite of a market that has much improved over the last 24 months, the Council is being told and is ready to accept that no affordable housing is viable today.

On this one issue alone, there are far, far too many unanswered questions for Overview and Scrutiny to approve the process that has been undertaken, and for it to give Cabinet its endorsement to take the current proposal to the next stage. O & S cannot, I strongly urge, allow the Council's adopted policies on affordable housing to be so substantially undermined.

I became particularly concerned about the provision of car parking after the March meeting of the Reference Group, at which the developer revealed that they wanted to both substantially increase the volume of retail and to substantially decrease the number of spaces in the public car park. Some of the email correspondence on this is contained within the Appendix.

In order to quantify my concern, I roughly calculated the amount of new additional retail space by deducting my estimate of the existing volume from the total retail space figure provided by the developer's architect. I then deducted the number of existing car parking spaces (in operation) from the number proposed to be provided in the new car park.

In order to illustrate my concern, I suggested that the result of the developer's latest proposal was that the city would be provided with circa 30 additional parking spaces to service an additional retail area equivalent to 10 times the ground floor of the existing Mark & Spencer store in town.

To me this had gridlock and congestion written all over it and, perhaps even more importantly, a bias against the residents of nearby rural wards such as my own, who regularly visit town for only a very short while. To them, Winchester is in danger of becoming a no-go area.

When I presented my concern to the Reference Group on 9th April, in a scene that could have been drawn by H M Bateman, I was roundly criticised and told that my figures, particularly those relating to the volume of existing retail space, were all wrong. When I mentioned that my figure was close to the figure that Arup, acting for the developer, had produced some years earlier, I was told that that must be wrong too.

A week later I wrote to officers to ask for the source of their floor space figures which, presumably, they had relied upon when condemning my figures. In what I can only describe as a disappointing response I was told, albeit politely, to get lost.

I have still not seen any raw data or professional analysis of the subject, and the position remains that there is, potentially, a serious shortfall in the number of public car parking spaces, possibly as many as 300-400, so as to ensure that the impact of the new development at least in terms of the provision of parking is a neutral one.

As a result of the lack of professional research undertaken there is a serious threat that the Council's adopted policies on parking will be significantly compromised.

It is also the case, that at no time at a Reference Group meeting was there any discussion about the need for the developer to mitigate the potential shortfall in parking provision by way of a payment in kind, as is usually required for all other developments.

It is not the Council's responsibility or an acceptable answer to simply say that spare capacity might be found in other car parks in the city.

Lastly on this point, I frequently asked for a detailed schedule of accommodation with gross and net areas and a set of scaled drawings. As at the date of the last Reference Group meeting we still had not received these which, to me, was as certain a sign of a lack of experience as there could be.

THE USE OF CONSULTANTS

It is said that the Council has made decisions based on the advice of experts and consultants. I do not believe that this claim bears close scrutiny. As noted above there is no Transport Consultant on board, which the Council should have had irrespective of the County's role as highways authority.

The only consultant that the Reference Group met over the year was Derek Latham, an experienced architect who was called in to advise on the architecture of the proposal, as a result of discussions between myself and the Leader. His actual selection and briefing was the responsibility of the CX.

Apart from being (mis)informed at the outset that he was obliged to act reasonably in terms of how the Council had to respond to proposed design changes, his scope of examination was kept very narrow and all the notes of the meetings in which he was involved show that all he ever did was to respond to the 20 or so points which were raised by the Members themselves at our first meeting.

He certainly gave helpful advice in terms of how the existing scheme, in its current form and layout, and in March in an exchange with myself he wrote to say that the developer's architect's "review has ***not*** been completed, and they should be left in no doubt as to this."

In subsequent meetings there was much aspirational talk by the developer about such things as their commitment to art which, when questioned, reflected no increase over their existing S106 obligation made in 2009. The Reference Group never had the benefit of hearing from Derek Latham that the design had reached a satisfactory (or better) conclusion even within the confines of his examination.

In my view, the amendments that have been made, though substantial in terms of the changes to the internal uses, amount to no more than superficial improvements to the overall design, its scale and the treatment of the elevations.

In short, we could have got so much more out of Derek Latham, but at no point was he asked to give an opinion about townscape or about the need for master-planning and how the scheme might relate to the wider context. He was not given free rein to explore and to consider matters afresh. There was no 'blue sky' thinking and, given his considerable experience and expertise, it was altogether a great opportunity missed.

One other consultant the Reference Group was aware of was Drivers Jonas Deloitte. However, apart from my own one visit to their offices, the Reference Group never met them or had any opportunity to discuss any aspect of the project with them.

DJD are a well respected multi-disciplined property consultancy but the advice that was sought from them was confined to certain financial matters and to providing a view on the development appraisal, when there was one, and on the financial structure within the Development Agreement.

In June 2012 they advised that the Development Agreement did reflect Best Consideration, but that was for the benefit of the CPO Inquiry and long before the current substantial changes to the scheme and to the underlying deal were revealed.

It is interesting to note though, that in June 2012 they observed that "the Council has the ability to control changes to the scheme and is in a strong negotiating position if these are required". My concern is that throughout the current process the Council has made little use of this strong negotiating position and is about to prematurely and unnecessarily surrender it.

Given the extent of their experience and range of services in the property field, the failure to engage more fully with DJD at various times, is another waste and mishandling of a great opportunity.

Nathaniel Litchfield & Partners is another consultant used by the Council, but again there was no interaction between them and the Reference Group. Again, this has to be regarded as a missed opportunity to better advise the Reference Group and, in turn, Cabinet and other Members .

On numerous occasions I asked for a Retail Impact Assessment to be carried out because of my concern for potential impacts to the High Street, but this request was ignored. NLP are also a highly respected firm but they are primarily a planning based consultancy, whereas I would have preferred a report from a retail agency based consultancy with a different skill-set. In any event, such a report should have been commissioned before the current amendments to the scheme were developed, rather than after the decision to accept the amendments appear to have been made.

I would quote and concur with what one of their directors wrote on 28th June 2012, at the time of the CPO inquiry, which was that "in our view the majority of this turnover will be diverted from other existing shops in the City Centre and out-of-centre retail stores in Winchester".

In my view, this significantly adverse impact will only have been intensified as a result of the growth in online retailing and, even more so, by the current proposal to locate an anchor store at the eastern end of the site furthest away from the prime pitch within the High Street.

There is likely to be a detrimental affect on other Council owned assets located within the High Street, which has not been at all considered, and overall the Reference Group has not at any time seen a professionally undertaken assessment of the likely retail impacts.

No townscape consultant has been appointed, nor has any regeneration consultant been consulted. Both could have provided critical insights into the physical and cultural impacts of the scheme.

Most importantly no Quantity Surveyor has been appointed. To a developer the QS is like a personal bodyguard who should be directly appointed, and who takes care of you in any consideration of the costs of development, in this case being [redacted]. It's a very, very important role and there is no excuse for not having appointed one, years ago, to provide regular advice as and when.

In summary, in my view, it would be wrong to say that the Council's decisions have all been informed and properly guided by professional advice.

Although it was known that there was much discussion and advice being sought about the forthcoming planning process, at no time did the Reference Group receive a clear picture of what was being proposed.

There was talk of the possibility of Section 96 applications, which normally apply to non-material amendments, and of Section 73 applications, which normally apply to variation of conditions in existing consents, and it was clear that the intention was to deal with all the various amendments in a piecemeal way.

On numerous occasions, I made the point that this type of approach would make it very difficult for the Planning Committee to achieve a proper understanding of what the whole proposal entailed, and what the true relationships between the separate blocks within the site, all of which were being altered to a greater or lesser extent, actually were.

In my view, as someone who has sat on the Planning Committee, this approach would greatly impair the ability of the Committee to properly assess and to determine any application. It is the case that given the Council's own interests in the development, there would be a greater onus on the Council to ensure the planning process was robust and its integrity was unchallengeable.

I was and still am concerned that the planning process envisaged is not just inappropriate itself, but when considered in the context of other developments on other sites, would inevitably lead to the Council's planning policies being significantly undermined.

One such recently adopted policy relates to CIL (community infrastructure levy) and I was told at one Reference Group meeting, that the planning process being contemplated would enable the developer to avoid the payment of CIL. In my view, as with the approach to affordable housing, the principle of what's good for the goose is good for the gander, has to be applied.

In my view, there should be no escape from the fact that the changes now being proposed to the previous scheme are material, both in physical and in policy terms, and that they should all be enshrined within a single new detailed planning application, with all that that entails.

A CASE OF PRE-DETERMINATION?

Earlier this week (on 3rd July), Steve Tilbury was quoted by the Hampshire Chronicle as saying "the Cabinet decision was the Council acting only as a landowner and will not affect the Council's later planning decision. "They are two separate decisions" he said."

He may very well have been misquoted because I note that on 16th September 2013, he wrote to Members and officers to say "so in practice whilst there are two decisions for the Council – as landlord and as planning authority – **what the public and stakeholders see is only one process.** They see the revised scheme emerge and then being put forward to the Council for decision."

This second observation which I fully concur with, very neatly encapsulates my concern that the very considerable promotional activity presently being carried out by the Council, albeit ostensibly as landowner and 'partner' to the developer, gives off every appearance of the planning decision having already been made.

I am happy to suggest that the Planning Committee is one of the best in the Council, and it would be harder to find a more thoughtful, responsible and open-minded group of individuals.

However, when they are faced with the weight of such promotional activity supported by Cabinet and by Officers, and by a likely recommendation to approve the application supported by every Council department involved in the planning process, these fine individuals will find their independence put under great strain. If they are minded to refuse the application, they will be questioned as to how a defence at Appeal might be justified both in terms of planning policy and in terms of cost.

There is, in the public view, no evidence of any 'Chinese wall' between the separate functions of the Council. The public only see one authority, one proposal and one decision.

There is already, in the public view as evidenced by many recent communications, a widely-held concern that the current process relating to the currently amended scheme, has lacked the benefit of a full public consultation process appropriate to the scale and significance of the scheme.

The appearance of predetermination cannot be avoided, and unless O & S takes the very greatest care and ensures that matters are progressed with extreme caution, there is a real danger that the integrity and reputation of the Council, including all its Members and officers, may be damaged.

By way of a summary I would highlight the predicament the Council is in which, as the CX wrote on 5th December 2013, is that "the Council are advised that the Development Agreement cannot be substantially changed without the risk of action under EU Procurement directives which would require that tenders for the contract to deliver the scheme be sought afresh".

Given the extent of the **changes sought by the developer** it is not credible, nor lawful, for variations not to be made to the Development Agreement, which contains contractual obligations including, 1) the provision of a bus station (on site according to a specific plan), 2) the provision of 35% affordable housing (amended by the S106 to equate to 100 units on site) and 3) the provision of an area for the relocation of the daily Middle Brook Street market and the Farmer's Market and other items, all of which the developer now wants to change.

As a result of a fear that the developer may withdraw from this transaction and that it might be left in the lurch without a developer partner, as it was in 2009, the Council has tried to limit the extent of the changes made both to the scheme itself and by implication to the Development Agreement.

Given the current economic climate and position in the cycle, and given the inherent attraction of the development opportunity this fear is wholly unwarranted, but it has nonetheless led to the Council compromising itself on a number of important matters including planning policy, housing policy, parking policy and the attainment of Best Consideration.

The Council may also have compromised itself with regard to the CPO Inquiry, and if the position of Stagecoach wasn't absolutely certain before the Inquiry, there was enough conjecture to warrant a thorough investigation to establish a true position prior to the Inquiry.

It should be noted that the current proposal to provide rows of bus stops, in Friarsgate and along the Broadway could have been put into effect by the Council in concert with HCC without the CPO.

Another fear I have heard expressed is that if their proposed amendments are not accepted, the developers might revert to the original scheme which even they don't like. This I believe, for reasons I will not expand upon here, is not a feasible option provided the Council acts in a competent and commercial manner though, personally, I would welcome Henderson's involvement in a completely revised scheme.

To a large extent the Council's current position resembles that of a batsman caught between wickets. It has just run from the 'old scheme' which it suspected before the CPO Inquiry was likely to be changed, primarily because of the absence of the bus station, towards a 'new scheme' which it doesn't want to admit is a new scheme, because that would mean that it would have to be re-offered to the open market. I would suggest that the only logical outcome is for the Council to head back to the pavilion to rethink its whole strategy for the development of this site.