

CABINET – 18 MARCH 2015

THE OVERVIEW AND SCRUTINY COMMITTEE – 23 MARCH 2015

SILVER HILL - REVIEW OF PROJECT POSITION

REPORT OF CORPORATE MANAGEMENT TEAM, HEAD OF ESTATES AND
HEAD OF LEGAL AND DEMOCRATIC SERVICES

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RECENT REFERENCES:

CAB 2665 – Silver Hill Judicial Review Decision - 3 March 2015

EXECUTIVE SUMMARY:

The report summarises the current position of the Silver Hill project following the decision of the recent Judicial Review process. All Members were notified of the outcome of Cabinet's consideration of Report CAB 2665 at its meeting on 3 March 2015, including the decision that the Council should not seek to appeal the High Court decision. Members will be aware that the High Court decision is now the subject of an appeal by TH Real Estate (Henderson). No decisions are required at this stage and it will be necessary to consider further reports on the issues in due course. Cabinet has indicated that both The Overview and Scrutiny Committee and full Council will be consulted.

If Members wish to examine some of the issues raised in the report in more detail, it may be necessary to resolve to go into exempt session, so that the potential legal and financial implications can be given further consideration.

RECOMMENDATIONS to Cabinet:

- 1 That the report be noted.

Recommendations to The Overview and Scrutiny Committee:

2. That the Committee considers whether it wishes to draw any matters to the attention of Cabinet.

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DETAIL:

1 Introduction

- 1.1 On 11 February 2015 the decision of the Court in the Judicial Review proceedings brought by Cllr Gottlieb was handed down. The Judge found against the Council and the Council has decided not to appeal against that decision. TH Real Estate (herein after referred to as 'Henderson') has decided to apply for leave to appeal the decision.
- 1.2 The purpose of this report is therefore not to provide any analysis or commentary on the Judicial Review decision (see CAB 2665 for further information on the decision) but to inform Cabinet as to how the project now stands and to describe the likely issues the Council has to consider whilst working to secure the much needed regeneration of the areas. No decisions are required at this stage. Cabinet has indicated that both The Overview and Scrutiny Committee and full Council will be consulted when worked up options are available.

2 Immediate Consequences of the Judicial Review decision

- 2.1 On 6 August 2014, Cabinet, after consulting Council at its meeting on 16 July 2014, agreed to make a series of variations to the Silver Hill Development Agreement. Henderson then submitted a planning application on which there was a unanimous decision by the Planning Committee to resolve to grant planning permission in December 2014 (PDC1012 refers).
- 2.2 Cllr Gottlieb commenced Judicial Review proceedings against the Council and following a hearing in January 2015 the Judge upheld his claim. As reported to Cabinet on 3 March 2015 the effect of that ruling is to prevent the Council from enacting the variations to the Development Agreement to which it had agreed.
- 2.3 The Judicial Review decision is now the subject of an appeal by Henderson. A preliminary stage in this process is for Henderson to seek permission from the Court of Appeal to appeal. If permission to appeal is granted, then it will probably be some months before an appeal is heard and a judgment made. The fact that an appeal has been made does not change the status of the recent judgment but, with proceedings before the courts, it would be wise to

avoid any public comments or statements which might later be deemed to impede the process of judicial decision making.

- 2.4 In relation to the December 2014 planning decision, the Council has not yet issued a decision notice in relation to the updated scheme because the Secretary of State is still considering whether to call-in the scheme for determination himself following third party representations upon a routine referral to DCLG. There is no timetable for the Secretary of State to make a decision on this and therefore no predictable date for the matter to be settled. However, the matter is unrelated to the Judicial Review decision and the Secretary of State must make his decision on purely planning grounds.

3 Current Position

- 3.1 The first key date for the scheme is the date on which the existing 'long stop' agreement with Henderson expires. This is 1 June 2015. If by this date the outstanding conditions have not been satisfied (or waived where that is allowed), then at any time after this date either Henderson or the Council can exercise its rights under the Development Agreement to bring that Agreement to an end. This is not what is called a 'drop dead' date in the contractual jargon, as the mere passing of the date does not automatically bring the Agreement to an end. Once the date has passed, however, either party may take a decision to terminate and bring the contractual relationship to an end. Neither party would be in breach of contract by taking such a decision. If however, at the date the Development Agreement was terminated the Council had not complied with its obligations under the Development Agreement, it could be at risk of a damages claim.
- 3.2 There is one scenario which Henderson have said publicly they are considering. Whilst the scheme which went before Planning Committee in 2014 cannot be implemented as things stand, there remains a planning approval dating from 2009. That could in principle be proceeded with by Henderson, and the first step would be for them to seek to fulfil (or, where provided in the Development Agreement, waive) the outstanding conditions necessary for the Development Agreement to go unconditional (without the amendments agreed by Cabinet in 2014 and quashed by the Judicial Review).
- 3.3 Some of the conditions in the Development Agreement must be met by the Council, and others must be met by Henderson. Both parties are required to comply with their respective obligations in respect of the conditions, as set out in the Development Agreement. As each condition is satisfied, the relevant party must give notice to the other. Once the last condition is met (or waived where applicable) then the Development Agreement becomes unconditional.
- 3.4 Some of the conditions can be waived by Henderson (e.g. the condition requiring agreements for leases of a specific proportion of the retail units in the scheme), and therefore if any of these are still outstanding, the Development Agreement could still go unconditional if Henderson waived compliance with them.

- 3.5 Other conditions cannot be waived by Henderson, and therefore in order for the Development Agreement to go unconditional, Henderson would have to:
- a) Secure a legally binding agreement with a funding partner (who must be approved by the Council, although approval must not be unreasonably withheld or delayed) which is sufficient to fund the property acquisitions and development;
 - b) Enter into a legally binding agreement with a Registered Provider for the sale to that provider of the affordable housing units of the development, and the subsequent letting and management of these units (again the terms of the agreement must be approved by the Council, not to be unreasonably withheld or delayed);
 - c) Demonstrate to the Council's reasonable satisfaction (immediately prior to all the other conditions being satisfied) that the scheme is "viable", i.e. that the anticipated profit produces a minimum of 10% of anticipated development costs.

None of these conditions can be waived by Henderson. The Council would need to confirm that the requirements of the Development Agreement have been met if the 2009 scheme were to be brought forward.

- 3.6 Some of the Conditions must be met by the Council. These are site assembly (agreement to acquire all land interests within the site and a confirmed CPO for the remaining interests), title (the Council deducing good and marketable title to its land) and appropriation of the Council's land interests for planning purposes.
- 3.7 Henderson may also wish to consider some variations to the 2009 scheme, of a lesser nature than those affected by the 2014 Judgement. Depending on the nature of such variations, the Council's consent may be required.
- 3.8 Henderson have also informed the Leader and officers that they are intending to pursue this option, possibly before the expiry of the current 'long stop' date of 1 June 2015. If Henderson is able to prove satisfaction (or, where applicable, waiver) of the outstanding conditions by 1 June 2015, the Development Agreement will automatically become unconditional.
- 3.9 If Henderson decide to bring forward proposals to implement the 2009 scheme, Members should be aware that there are a number of other relevant matters. The 2009 scheme has a confirmed Compulsory Purchase Order (CPO), so land assembly could proceed. There are also a number of significant practical issues to overcome. For example, the 2009 scheme includes a bus station, although Stagecoach's stated position is that they do not require such a facility. The 2009 scheme also includes provision for 100 affordable housing units of which 20 are for social rent and 80 for shared ownership. Henderson will have to offer acceptable commercial terms to a Registered Provider of social housing to fulfil their Development Agreement obligation, or (if the Council requested and Henderson agreed) to provide an

equivalent off-site contribution in accordance with its current policy. There are many other smaller but important detailed matters that would have to be resolved if Henderson were to seek to progress the 2009 scheme.

4 Other Scenarios

- 4.1 Once the 1 June 2015 date passes, the Council, and indeed Henderson, may wish to consider whether they take steps to terminate the Agreement. At that point, Members will require further advice as to how to proceed. One option would be to terminate and seek to begin afresh. The implications of starting from scratch in planning Silver Hill regeneration are considered further under section 6 below.
- 4.2 Members should also note two other dates of relevance, both in early 2016. The existing planning consent for the 2009 scheme will expire if not commenced by February 2016, and in March 2016 the three year life of the Compulsory Purchase Order will run out. Without CPO powers, there is no chance that any variant of the existing scheme will be able to proceed. Again, these dates will need to be considered as and when we explore further scenarios.
- 4.3 There is an option whereby the Council could extend the life of the existing CPO by a further three years, by using the Notice to Treat procedure, but this would also potentially increase the Council's financial exposure and risk. A variation to the existing CPO indemnity agreement would be required to minimise this risk. Another CPO could also be sought – with the attendant risk and additional costs. The Council will also need to seek legal, valuation and financial advice on all the choices which may be open to it.

5 Issues Arising

- 5.1 There are a number of issues which the Council needs to be aware of as it considers its position and actions over the next few months. The significance of each of these will differ depending on the context, and the importance placed upon them by different interest groups, and they are therefore set out below as statements rather than with any attempt to determine how they should be addressed.

Planning Position

- 5.2 The Council's Local Plan policies call for the redevelopment of the area on a comprehensive basis and rely upon this town centre site for the provision of the additional retail space which Winchester requires. The provision of residential dwellings is also a useful though not critical element in ensuring that there is a five year housing land supply for the District. Without deliverable development proposals for Silver Hill there is an increased risk that alternative and less favoured options for fulfilling these requirements might be put forward.

Property Position

- 5.3 Property within the Silver Hill regeneration area is in a range of ownerships. These include the City Council, Henderson, Stagecoach, the owners of the St Clements surgery building, the owners of the freehold of the Sainsbury's building, the Royal Ancient Order of Buffalos, and several others. It should also be understood that the existence of valuable occupational leases, rights to park and rights of access can also create very significant issues in moving comprehensive development forward. The chances of obtaining all the necessary agreements to promote a comprehensive redevelopment by negotiation alone are slim. Some of the property owners within the scheme have been relying on redevelopment proposals to resolve existing issues and to promote their own interests and conditional agreements. Although agreements have been reached by Henderson with some landowners within the site area, these were linked to the current CPO, and can therefore only be used in connection with acquisition under the existing CPO.
- 5.4 Of particular concern to the Council is that properties which it owns, such as Coitbury House, King's Walk and the Friarsgate Multi Storey Car Park, are in poor condition and represent a significant future liability with limited potential for short term improvement. In the absence of a viable scheme, the Council will need to consider the best approach to investment in these properties to seek to maintain a stream of income which supports services. Details of the Council's assets within the regeneration area are given in Appendix 1.
- 5.5 Members will recall that in January 2014, the Council acquired the head leasehold interest in Kings Walk following a Cabinet decision in November 2013. If the scheme proceeds, those properties will form part of the scheme and the Council will be reimbursed for the costs it incurred in purchasing the head leasehold interest. However, should the scheme fall, the Council can either require Henderson to take a transfer of this interest (again reimbursing the costs it incurred in purchasing it), or choose to retain the properties (at the same time releasing Henderson from its involvement). In the event that the scheme were not to proceed, Members will need to decide whether to retain the Council's head leasehold interest in these properties, or require Henderson to acquire them.

St Clements GP Surgery

- 5.6 The existing surgery building is to be purchased and demolished as part of the Silver Hill scheme, with the Practice relocated to a new primary health care facility built and rented to them by the Council on the Upper Brook Street surface car park – for which planning consent exists, although revisions are required and business case approval has yet to be considered by Cabinet. At present, there is no signed agreement with the Practice for their relocation. If the scheme does not go ahead, the Practice will have no buyer for its existing building and will not be able to go ahead with this transaction. Unfortunately the existing building is not of high quality and there remains a requirement to consider the long term future of the surgery in a way which does not involve

its relocation outside the city centre (which has already happened with the Friarsgate practice).

Friarsgate Car Park

- 5.7 As expected the condition of the Friarsgate car park has now deteriorated to the point where it is to be closed permanently at the end of March 2015. The structural weaknesses in the concrete frame of the building were not ones which could have been addressed by any reasonable amount of expenditure and it was accepted years ago that demolition and replacement was the only viable alternative. Parts of the car park have already been closed, and the final closure will involve the removal of 131 spaces. When the Car Park is closed, the total capacity of Winchester's town centre car parks will then have been reduced by 351 spaces.

The Brooks

- 5.8 The City Council owns the freehold of the Brooks Centre but it is operated under the terms of a 200 year lease. The current owners of the lease, London and Henley Properties, are in administration and the lease is being offered for sale by their administrator. Henderson had indicated an interest in purchasing the lease with a view to redevelopment of the Brooks in due course, but it is not known what their current intentions are. It seems unlikely that they would purchase the lease unless the Silver Hill scheme proceeds in some form, since a stand alone project the redevelopment of the Brooks would be a difficult proposition. The current concern is that control of the Brooks lease may pass into an ownership whose intentions are not aligned with a future redevelopment of the broader Silver Hill/Brooks area.

Bus Station

- 5.9 It is not known what Stagecoach's view is about the operation of or investment in the existing bus station should there be no short to medium term plan for replacement facilities to be provided.

6 Implications of restarting the Regeneration Process

- 6.1 It is possible, through whatever turn of events, that the Council arrives at a position where it is necessary to restart from the beginning the process of regenerating the Silver Hill area. It is important that there is a clear understanding of what such a process would involve and the steps that will have to be taken, not least because there may be significantly contested elements of any proposals. Whilst it would be attractive to believe that there is a financially deliverable regeneration scheme that would achieve unanimous support from around Winchester, this may not be the case in practice.
- 6.2 Given that objectors have challenged matters such as the requirement for additional retail space in Winchester town centre, consideration of a new scheme would have to start from an analysis of the evidence and strategy for Winchester's town centre as set out in the recently adopted Local Plan. This

would have to be consulted upon, debated and any modifications of the relevant Local Plan policies made through the appropriate mechanism before a new planning brief for the area could be produced. This would have to consider whether the Council maintained its long held requirement for comprehensive development in accordance with a masterplan, or whether it was willing to accept piecemeal development of individual blocks.

- 6.3 It took six years between 1997 and 2003 to accomplish this work on the last occasion, but it must be hoped that this could be reduced if undertaken in the future.
- 6.4 Once the vision for the area is clear, the Council could seek to procure a development partner through an EU procurement process to draw up a new scheme, obtain planning consent and provide an indemnity for the costs of obtaining a new Compulsory Purchase Order. It may be difficult to do this given the appetite of the development community for the risks in such a process, as highlighted by Deloitte, and given recent events in Winchester.
- 6.5 It may therefore be necessary for the Council to undertake this process itself, at risk, following the procurement of a design team and project manager. This is what is happening in other areas, for example in Chester, the Council is promoting the city centre Northgate redevelopment using its own resources (at a cost of several million pounds) after its commercial arrangement with a developer stalled. Commercial viability will remain a key constraint because any scheme will eventually be taken to the market to secure funding and must be capable of making a satisfactory return. The process of consulting on, designing and gaining planning consent for a viable redevelopment proposal would require some time to achieve.
- 6.6 If the Council were to promote its own design and CPO process then it would, on the completion of that, go to the market to procure a developer to secure funding and take on development risk through to completion. An agreement securing terms and returns would be required. The Council may need to bear more of the risk than existed with the current Development Agreement.
- 6.7 Whilst this process runs its course, the site-related issues mentioned above would continue to raise questions and the passage of time may add to the complexities that the regeneration process faces and therefore to the time it takes.
- 6.8 Members should therefore be aware that if the regeneration process were to start again it would involve a major commitment of time and probably money and is most unlikely to proceed quickly. That does not mean that it is not possible or that it would not have a beneficial conclusion, but the resources required must be factored in to any decisions which are taken.
- 6.9 The Council's lawyers, BLP, have prepared a likely timeline for the new process which assumes that the Council would procure a new developer to bring forward a new scheme. This is at Appendix 2.

7 Conclusion

- 7.1 This report has endeavoured to set out what the current position of the Silver Hill process is and what issues will have to be dealt with in the near future. It is not possible to articulate all of the possible permutations of events and nor is it necessary at this juncture for the Council to take any specific action. Henderson are considering whether the 2009 scheme can be taken forward and they may seek to satisfy the conditions for the scheme which has planning consent and in accordance with the existing Development Agreement. They may seek to do this before 1 June 2015 or may find that they cannot achieve this. After 1 June 2015, the Council has other options which will merit consideration alongside any proposal to implement the 2009 scheme.

OTHER CONSIDERATIONS:

8 COMMUNITY STRATEGY AND PORTFOLIO PLANS (RELEVANCE TO):

- 8.1 The regeneration of the Silver Hill area is a key corporate project and one of the most important issues for the future of Winchester town centre.

9 RESOURCE IMPLICATIONS:

- 9.1 The potential resource issues arising from the Silver Hill project are of considerable significance to the Council's financial position.
- 9.2 In February, Council unanimously voted for a Budget amendment to the effect that a revised revenue budget and capital programme be brought forward as soon as practicable when the options for the Silver Hill project became clearer.
- 9.3 There are also potential implications for the 2014/15 annual accounts which cannot currently be fully quantified.
- 9.4 As the Council begins to consider in more details the various scenarios which may arise so we will need to obtain legal, valuation and specialist financial advice on each option, and on the wider implications for the Council's capital and revenue budgets.

10 RISK MANAGEMENT ISSUES

- 10.1 Silver Hill has been identified as a key corporate risk for some years with the major risk being the impact of the failure to deliver the scheme. If regeneration does not go ahead in a timely manner then this may have a negative impact on the economic prospects of the town.
- 10.2 The principal risks arising from the matters in this report are:-
- a) If the development does not proceed, the Council will not receive the rental income which it is entitled to under the Development Agreement

and subsequent lease to Henderson. Furthermore, it will incur additional unbudgeted costs in maintaining its assets in the site, and suffer reduced income as a result of the deteriorating condition of those assets, unless and until those assets are re-developed.

- b) If the development does not proceed, it may not be possible to secure an alternative developer for the comprehensive redevelopment of the site (either at all, or on comparable financial terms), again leading to adverse financial effects on the Council. The costs of promoting an alternative development may fall on the Council.
- c) The risk of substantial delay in securing redevelopment of the area by another developer if the development does not proceed which may have an adverse effect on the town centre.
- d) The risk that the Compulsory Purchase Order expires due to delay in developing the site (the Order must be implemented before March 2016), and the consequent risk that it may not be possible to secure confirmation of a replacement CPO.
- e) The risk of challenge to the Council's decisions which are the subject of this report and any future options it may consider on the way forward.
- f) The Council will need to ensure that it complies with its obligations under the Development Agreement to avoid risk of claims from Henderson.
- g) Risks to the Council's reputation depending on the approach it takes on considering its future options.

10.3 As experience has demonstrated, any scenario which is considered will bring with it significant financial, legal and estates risks. The Council will need to ensure it has independent professional advice on all these matters to assist in managing and mitigating that risk.

10.4 The Council is also a significant landowner within this area, and so long as it has no clear plans to secure regeneration there are risks to the quality, utility and viability of those properties which may need significant investment to address.

BACKGROUND DOCUMENTS:

None

APPENDICES:

Appendix 1 – List of the Council property and assets within the Silver Hill regeneration area.

Appendix 2 – Timeline for Procurement Process to Bring Forward a New Scheme.

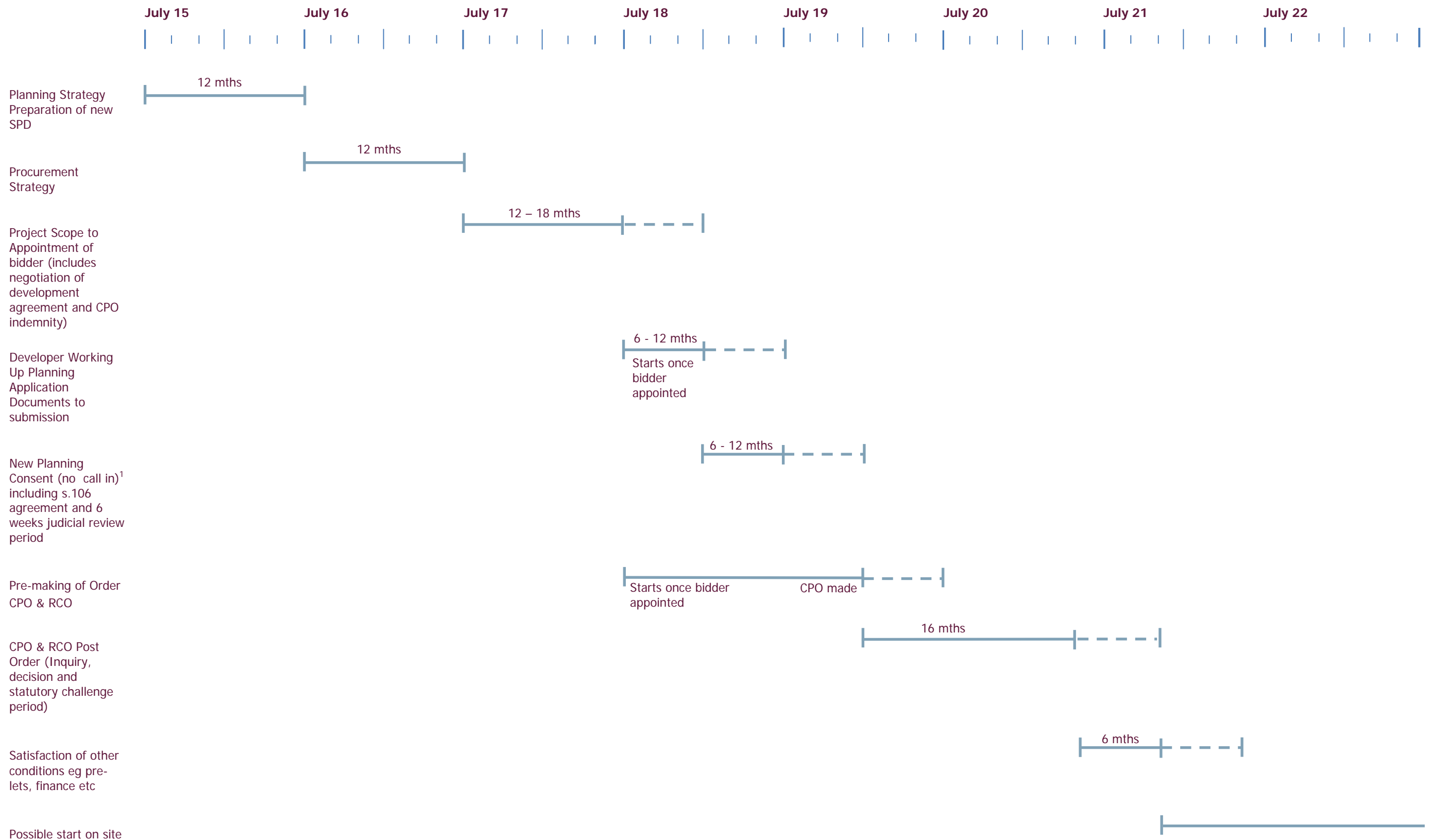
Schedule of Council Properties in Silver Hill Redevelopment Area

(Interests are Freehold unless otherwise stated)

1. Kings Walk Shopping Precinct and Part of Friarsgate Car Park (Including Units 1-13 Kings Walk, Iceland, and Shakeaway units).
2. Land at junction of Tanner Street and Silver Hill (former Marks and Spencer customer car park).
3. Former Post Office Yard, Tanner Street and Part of Friarsgate Car Park (leasehold).
4. Rear access to Bus Station from Friarsgate.
5. Land adjacent to 27 Eastgate Street (currently used as Housing car park).
6. Coitbury House.
7. Service yard to rear of 151-153 High Street.

(Acquired 2014)

8. 4 Middle Brook Street (Poundland and yard at rear (including part of Friarsgate Car Park over).
9. Antiques Market.
10. Kings Walk Shopping Precinct (leasehold).



¹ If planning called in add another 12 months to programme.