

CABINET

21 MAY 2015

THE OVERVIEW AND SCRUTINY COMMITTEE

21 MAY 2015

SILVER HILL UPDATE – SUBMISSION BY DEVELOPER

REPORT OF SILVER HILL PROJECT TEAM

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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

EXECUTIVE SUMMARY:

The report outlines the submissions that have been made by Silverhill Winchester No. 1 Limited (SHW1) in relation to the 2004 Silver Hill Development Agreement and asks Cabinet to determine how the Council should respond. The report (Appendix 1) includes a table setting out the risks the Council should consider in its decision-making process.

## RECOMMENDATIONS:

### To Cabinet

- 1 That Cabinet notes the submission by Silverhill Winchester No. 1 Limited of their request for the approval of the terms on which the affordable housing condition and funding condition of the Silver Hill Development Agreement be met;
- 2 That Cabinet notes the submission by Silverhill Winchester No. 1 Limited of a financial statement which it says demonstrates that the viability condition of the Silver Hill Development agreement will be met;
- 3 That Cabinet notes the option provided by Silverhill Winchester No. 1 Limited to extend the timetable for the Council's response to their submissions to no later than 1 October 2015 provided that the Council similarly extends the Long Stop Date and agrees not to exercise any rights to terminate.
- 4 That in the light of this report and the information contained in Exempt Appendix 3, Cabinet decides whether to extend the Long Stop Date;
- 5 That Cabinet notes that, if the Long Stop Date is not extended it will be necessary to meet the timetable for considering SHW1's submissions as set out in the Development Agreement and that this will precede the report of the Independent Review;
- 6 That consideration of the Financial Viability condition be undertaken by Full Council in due course so it has the opportunity to make any comments to Cabinet before it decides how to proceed;
- 7 That the Council's approval of the terms of the Funding and Affordable Housing conditions be given by a decision of Cabinet, noting that in view of the straightforward nature of the information contained in those terms this decision may have to be taken by a special meeting of Cabinet.
- 8 That such land as is within the Council's ownership within the area shown coloured pink on the plan at Appendix 2 to the report be appropriated for planning purposes within the meaning of Part IX of the Town and Country Planning Act 1990.
- 9 That Cabinet notes the Development Account position at 31 March 2015 as set out in Exempt Appendix 4 to the report.

### To The Overview and Scrutiny Committee

- 10 That The Overview and Scrutiny makes any comments on the decisions of Cabinet in respect of this report and Exempt Report CAB taken earlier today.

CABINET21 MAY 2015THE OVERVIEW AND SCRUTINY COMMITTEE21 MAY 2015SILVER HILL UPDATE - SUBMISSION BY DEVELOPERREPORT OF SILVER HILL PROJECT TEAM1 Introduction

- 1.1 On Wednesday 6 May 2015, Silverhill Winchester No. 1 Limited (SHW1) formally submitted documentation to the Council under the Silver Hill Development Agreement of 22 December 2004, in respect of various conditions which have to be satisfied before the Development Agreement becomes unconditional. This submission related to the Planning Condition, Road Closure Condition, and Survey Reports Condition.
- 1.2 Further submissions dated Friday 8 May 2015 have been received in respect of three other outstanding conditions. The submissions:-
  - a) seek approval of the identity of the provider of the affordable housing element of the scheme, and the terms for the affordable housing agreement;
  - b) seek approval of the identity of the Funder (i.e. the provider of the funds to allow the site to be acquired and the development to be carried out) and the terms for the funding agreement with that Funder;
  - c) seek to demonstrate to the Council that the Financial Viability condition can and will be met at the point when the other conditions are discharged. If the Council concludes that the Financial Viability condition is met by this submission then confirmation of no material changes would be needed immediately prior to unconditionality.
- 1.3 Assuming the Council approves the matters set out in 1.2 a) and b) above, completion of agreements with the affordable housing provider and the Funder will fulfil the two conditions to which they relate. It is the terms to be incorporated into these agreements which must be approved by the Council. If the terms are approved, SHW1 will then enter into the agreements with the counter-parties and the conditions will thereby be discharged.
- 1.4 The scheme to which the submissions relate is the 2009 scheme for which the Council has previously given all necessary consents under the Development Agreement. There is also a valid planning consent for the implementation of

this 2009 scheme. Although SHW1 is clear that, in its opinion, the 2014 scheme is superior to the 2009 scheme in many respects, the 2014 scheme cannot be implemented due to the legal action taken against the Council's decision-making process. However, having reviewed their financial projections and negotiated with a funding partner, SHW1 consider that the 2009 scheme can be commercially viable and will still bring the benefits that were envisaged when the Council approved the scheme. These include:

- a) 95,000 square feet of improved retail space which will strengthen Winchester's retail offer and consolidate its county town position;
  - b) 287 units of residential accommodation which will provide sustainable town centre living and help the Council meet its housing delivery targets without further green field development;
  - c) 100 affordable housing units of which 20 will be for social rent;
  - d) A replacement for the now closed Friarsgate car park
  - e) A new 12 bay bus station. The Council is required to grant a subunderlease of the Bus Station to Stagecoach based on terms set out in the Development Agreement, with the details to be negotiated by SHW1. If Stagecoach declined to accept the lease, the Council could operate the bus station and charge bus operators a departure tax to meet operating costs;
  - f) Improvements to the Broadway creating additional space for the street market, a new public square and other public realm improvements;
  - g) The acquisition of the existing building housing the St Clements GP surgery, allowing the Practice to relocate to a new site and move out of the existing building, the state of which is now becoming a major cause of concern for the partners;
  - h) A scheme design by Allies and Morrison which, though improved by the minor modifications of the 2014 scheme, has a full planning consent based on very careful design considerations and analysis.
- 1.5 SHW1's decision to pursue the 2009 scheme is a commercial one and they have made clear in their submission that they would have preferred to implement the 2014 scheme which they consider to be improved by the joint working with the Council. Nevertheless, the 2009 scheme retains provision of an off-street bus station, and affordable housing, which covers points made by some objectors to the 2014 scheme.
- 1.6 Members will be aware of the Motion passed by full Council on 1 April 2015, as reported to Cabinet at its meeting of 15 April, and which was accepted by Cabinet as part of its resolution on the matter (CAB2688 refers). The resolution stated:-

*“That no variations will be made to the Development Agreement until such time as the Independent Review of the Silver Hill decision making is completed and its recommendations, if any, are acted upon.”*

Members will wish to consider the report in the context of this resolution.

## 2 Discharge of Conditions

- 2.1 The Planning Condition, Road Closure Condition and Survey Reports Condition do not require any Council approval, and they are fulfilled on the completion of certain events (e.g. the grant of planning permission, etc.) and in any event can be waived by the Developer. The various events referred to in these conditions have now all occurred, and in any event the Developer has exercised its rights under the Development Agreement to waive them (to the extent that they may not have been fulfilled). Officers have therefore formally acknowledged that these conditions have been met/waived and no further action is required in respect of them.
- 2.2 The other conditions which SHW1 have addressed in their submission are the Affordable Housing condition, the Funding condition and the Financial Viability condition.
- 2.3 In brief the requirements for each condition to be fulfilled are as follows:
- a) That the Developer enters into a legally binding agreement with a Registered Provider of affordable housing (approved by the Council) for the sale of the affordable housing units within the Development, and the letting and management of these units, on terms to be approved by the Council (such approval not to be unreasonably withheld or delayed). The Development Agreement requires the provision of 80 shared ownership units and 20 social rented units. SHW1 have submitted details of a proposed Registered Provider, and Heads of Terms for an agreement with that Registered Provider, for consideration and approval. These have already been discussed with officers in the Strategic Housing team (who have acted in accordance with the instructions of Council in discussing these with SHW1 as required by the Development Agreement). If the Heads of Terms are agreed then the agreement based on those terms will be drawn up and entered into by SHW1. It is the Heads of Terms which embody the relevant commercial matters and although the actual agreement must exist and be seen by the Council, it is the commercial elements which are for Members to make a judgement upon in relation to the condition.
  - b) That the Developer enters into a legally binding agreement with a Funder (unconnected with the Developer), with the identity of that Funder and the principal terms of the agreement having been approved by the Council (such approval not to be unreasonably withheld or delayed). Again, it is the identity and financial standing of the Funder proposed and the relationship to the Developer which is the consideration for the Council. Details of the proposed Funder and the

Heads of Terms for the proposed agreement have been submitted for the Council's consideration.

- c) That the Developer can demonstrate to the reasonable satisfaction of the Council that the anticipated profit from the development is not less than 10% of anticipated profit on cost. The purpose of this condition is to safeguard the Council from a development proceeding with too little profit being made to ensure that it is successful. There is no upside risk to the Council on the viability condition since if more profit is eventually made than is shown in the appraisal, the Council will benefit via the overage arrangement. The Financial Viability condition is to be satisfied 'immediately before' the Development Agreement goes unconditional but because of the amount of material required to support the viability assessment "immediately" must be interpreted reasonably.
- 2.4 In the case of the first two conditions, SHW1 has asserted that the condition can be met upon the completion of a legal agreement, based on the terms proposed. In the case of the third condition, SHW1 has asserted that the development is viable within the terms of the Development Agreement. The Council has to respond to these assertions by considering the submitted material which is relevant to each condition as set out in the Development Agreement. Under the terms of the Development Agreement, the Council has 15 working days to respond to each submission. It may ask for more information which it reasonably requires from SHW1 within that period. SHW1 must provide the Council with the additional information requested, although there is no specific time period within which they must do so (since it will depend on the complexity of the request). Once the Council has received the additional information it has asked for, it must make its decision within a further 15 working days. Because it is possible that the additional information may be returned at different times, the period of 15 working days may expire at different times also.
- 2.5 To protect the Council's position, officers have instructed the Council's advisors to begin consideration of the material submitted by SHW1 with a view, in the first instance, to ascertaining whether further information is required. This work has been commenced because until the consideration of this report it must be assumed that the Council has 15 days to make its 'first instance' response to SHW1.
- 2.6 Further meetings of Cabinet will be arranged to consider the applications, once the dates for the relevant decisions are known. These decisions are matters for Cabinet, but as it has done in the past, Cabinet could consult full Council before taking the decisions. However, as the dates for the decisions may not coincide, it may be impractical to arrange a series of separate meetings (involving Cabinet, The Overview and Scrutiny Committee, Council, and then Cabinet again) for all decisions. It would therefore be appropriate to put the key issue which all Members will be interested in, namely the financial viability of the scheme, to full Council, before Cabinet make the final decision

on this issue, with the other decisions (in respect of the Social Housing Condition and the Funding Condition) being considered by Cabinet alone.

### 3 Conditions to be discharged by the Council

- 3.1 One of the conditions which the Council has to comply with is the Land Appropriation Condition. This requires the Council to formally appropriate the land within the scheme which it owns, from the present purposes for which it is held (which will include, for example, car parking purposes under the Road Traffic Regulation Act 1984 in respect of Friarsgate Car park), to planning purposes within the meaning of Part IX of the Town and Country Planning Act 1990 (as amended).
- 3.2 The plan at Appendix 2 is the map included in the 2011 CPO, and shows in pink the land which will be acquired by the Council under the CPO (to the extent that it does not already own such land). In respect of the land coloured blue, only oversailing rights will be required (to allow cranes to construct the development).
- 3.3 Only the land owned by the Council within the pink area will need to be appropriated.

### 4 Timetable for Consideration of Submissions

- 4.1 The existing Long Stop Date of 1 June 2015 is the date after which either party may terminate the Development Agreement if the Development Agreement has not by that date become unconditional. This date was set by the Council in order to ensure that SHW1 made progress in bringing forward the development. It is not a 'drop dead' date, in that nothing happens after 1 June 2015 unless one of the parties (SHW1 or the Council) takes positive action to terminate the Development Agreement. However, both parties are exposed to significant risks, albeit of a different nature, once the date is passed. The Development Agreement contains provisions that if the Council does give notice to terminate the Agreement on grounds of non fulfilment of conditions, SHW1 have 20 working days to fulfil the conditions.
- 4.2 SHW1 have clearly timed their submissions in the expectation that the Council will comply with its obligations for decision making under the timetable set out Development Agreement.
- 4.3 However, SHW1 have been made aware of the expected timetable for the submission of the report on the Independent Review of Silver Hill to the Council, which is expected in the summer. They recognise the public sensitivity of the decision- making process for the Council. Without prejudice to their contractual position, they have indicated that they would therefore agree that the Council does not have to respond to the submissions, which SHW1 have made, within the period set out in the Development Agreement, but instead can delay its response until the Council has formally considered the outcome of the Independent Review. However, this would be on the basis that the revised timetable would be such that the Council must make a final

decision no later than 1<sup>st</sup> October 2015 whatever happens. In practice, decisions would have to be made by 24 September 2015, in order to ensure that the decisions could be formally notified to SHW.

4.4 This would require two formal agreements:

- a) SHW1 to agree that the Council would not be in breach of its Development Agreement obligations if it failed to provide a positive response in accordance with the Development Agreement, provided that it did make the necessary decisions by 24 September 2015 and communicated these to SHW1 by no later than 1 October 2015.
- b) The Council and SHW1 to agree that the Long Stop Date, until after which both parties agree not to use their rights of termination, be extended from 1 June 2015 to 1 October 2015; and

4.5 If the Council agrees to proceed on this basis, this would allow:-

- a) the Council's advisors to have all the time they reasonably need to complete their work, without being under pressure to complete within the tight timescales of the Development Agreement;
- b) the Council to have more time to arrange convenient meetings and consideration by Members;
- c) (providing that the Independent Review is completed by the summer) the Council to have the benefit of receiving the report on the Independent Review before making a final decision on the SHW1 submissions.

4.6 Cabinet should however note several important points if it chooses to agree this route:

- a) If the Independent Review is not completed and reported in time for a final decision on the Council's response to the SHW1 submission by 24 September 2015, then the Council will have to proceed with that decision in any case or potentially be in breach of the Development Agreement. Given the amount of material which has been given to the Independent Reviewer, there is a possibility that her work will take longer than currently expected. If that were to be the case, it may not be possible to delay decision making on the SHW1 submissions until after the Council has considered her report.
- b) The material contained in the SHW1 submission is essentially factual information for evaluation and consideration. The Council has to have regard to the independent professional advice it receives and to its Development Agreement obligations, whatever the context in which it is considering them. It may be therefore that the findings of the Independent Review will not have a bearing on these decisions.



- c) If the scheme does eventually proceed then the delay in decision making will have added to the interest costs of the development and therefore increased the amount of the Developer's profit very slightly, and delayed the point at which the Council would receive a share of any overage.
- 4.7 Exempt Appendix 3 to this report considers the relationship of this decision-making process with other matters which are of relevance to the choice of options. Before considering the recommendations in this report, Cabinet is invited to consider the content of this Exempt Appendix.
- 4.8 It is for Cabinet to determine which timetable it wishes to follow. It is recognised that Members would prefer to see the outcome of the Independent Review, whether or not this has any direct bearing on the question of the conditionality of the 2009 scheme, but that cannot be guaranteed given the timetable for the work. SHW1 have agreed to consent to some flexibility on timescale, but it would be a mistake to confuse this with a more general flexibility in their expectations that the Council will meet its obligations under the Development Agreement. However, the matters set out in Exempt Appendix 3 will also have a bearing on the decision to be reached.

#### OTHER CONSIDERATIONS:

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

- 5.1 The Silver Hill scheme is one of the Council's major projects and represents a major regeneration in the interests of the local economy and social well-being of the District.

##### 6 RESOURCE IMPLICATIONS:

- 6.1 The Council has already decided to obtain advice on feasibility from two independent firms and budget provision has been made for this.
- 6.2 The Development Account position was last reported to Members in July 2014 (CAB2603 refers). An updated position is provided at Exempt Appendix 4.
- 6.3 At the time the Development Agreement becomes unconditional, the Council would expect to receive a s106 receipt of £700k, and the repayment of the costs of the properties purchased in 2014 of £5m, enabling the £5m borrowing to be repaid and releasing £170k to the Useable Reserves; ie Useable Reserves would increase by £870k in total.
- 6.4 In due course, the Council would also have the option to proceed with the purchase of the car park, which would be beneficial in future years.
- 6.5 If, for any reason there was a breach of contract, there would be a risk of a claim against the Council which, depending on the circumstances, could have a significant impact on the Council's financial position.

## 7 RISK MANAGEMENT ISSUES

- 7.1 There are a number of significant risks attached to considering the submissions from SHW1, the Independent Review and the decision making process. These are set out in the table attached as Appendix 1.

### BACKGROUND DOCUMENTS:

All Exempt

### APPENDICES:

Appendix 1 Risk Management Table

Appendix 2 Map showing extent of land required for the Development

Exempt Appendix 3 Legal Advice

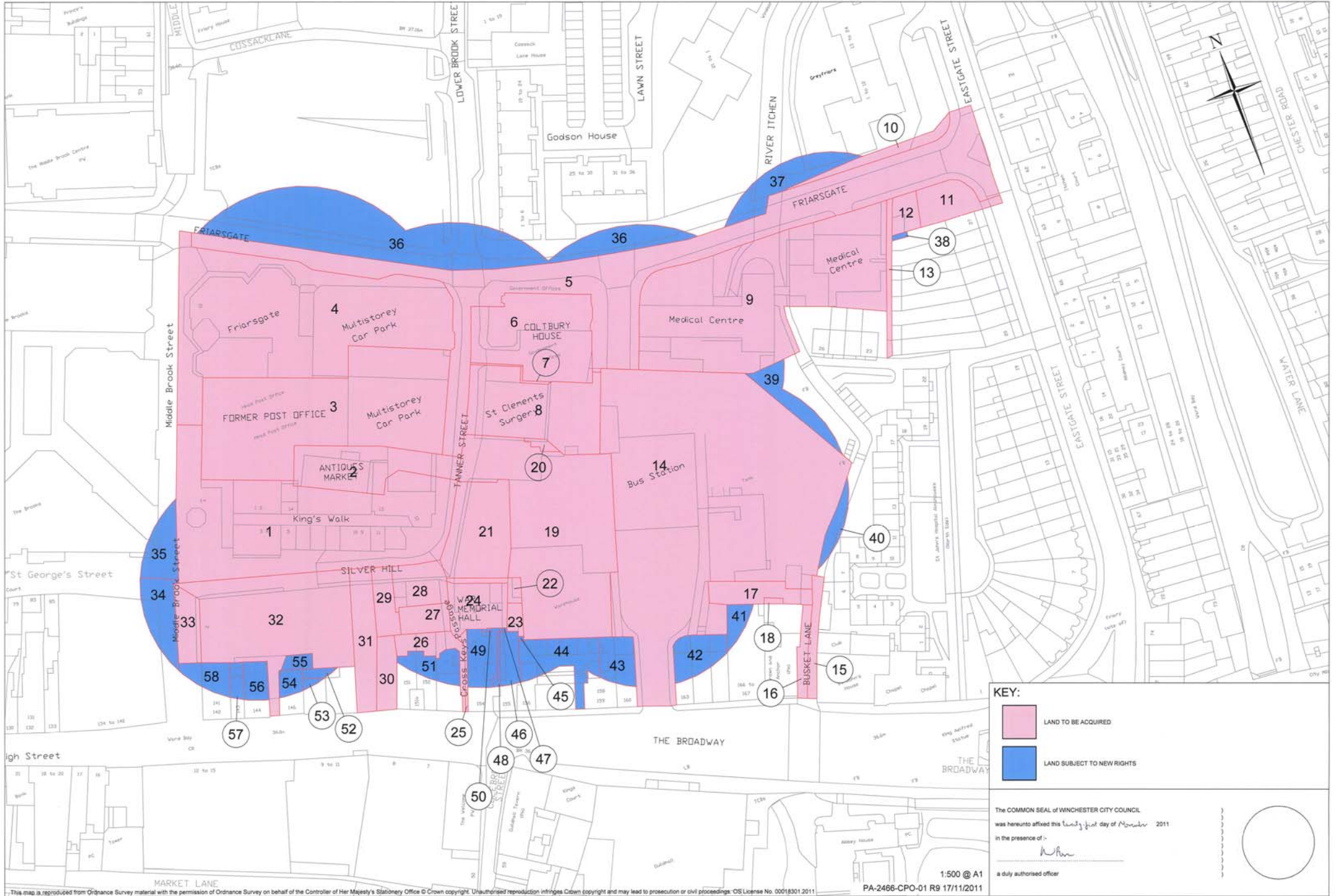
Exempt Appendix 4 Development Account to 31 March 2015

Risk Management Table

<b>Risk ID</b>	<b>Description of Risk</b>	<b>Score</b>	<b>Risk Control (i.e. Accept, Mitigate, Eliminate etc)</b>
01	Regeneration of Silver Hill area is substantially delayed by the need to restart a design and development process. Impacts on the economy of the city.	4	Seek consensus for delivery of scheme which meets all reasonable expectations
02	Lack of city centre car parking capacity at ultra peak times due to failure to replace Friarsgate car park creates negative perception of Winchester as shopping destination	6	Ensure a scheme progresses as quickly as possible including replacement car park
03	Promotion by developers of out of town retail development if Local Plan policy requirement cannot be met in town centre with impact on town centre economy	6	Ensure Silver Hill scheme progress in timely fashion
04	Failure to deliver market residential dwellings creates additional pressure for site release	2	Ensure Silver Hill scheme progress in timely fashion
05	Failure to deliver any affordable housing from Silver Hill regeneration creates lost opportunity to meet housing need	4	Ensure Silver Hill scheme progress in timely fashion
06	Negative impact on Council's finances if scheme fails to progress caused by additional estate management costs (including potential demolitions and consequential costs) and temporary loss of income from rent and overage.	8	Prudent budget set, but capital programme would need revision.
07	Contractual payment of £700k to Council will not be received if scheme does not progress. £5m receipt foregone if scheme does not proceed or Council does not exercise option. Increase in maintenance costs and potential liabilities	4	Set prudent budget which excludes receipts and ensure adequate reserves
08	Failure to meet contractual obligations under Development Agreement creates scope for damages claim against Council	3	Meet contractual obligations and act in accordance with prudent legal and financial advice. Ensure potential financial consequences of this are understood by decision makers.


<b>Risk ID</b>	<b>Description of Risk</b>	<b>Score</b>	<b>Risk Control (i.e. Accept, Mitigate, Eliminate etc)</b>
09	Failure to provide timescale for new facilities impacts on Stagecoach decisions regarding existing bus station with possible negative effects on bus services	2	Maintain active communication with Stagecoach.
10	Lack of capacity within City Council to manage simultaneous major projects including restarting Silver Hill development process	4	Consider and plan for resource requirements through Project Management Group
11	Unrealistic assessment of timescale for delivery of alternative commercially feasible development proposals with possible financial or economic consequences, including investor appetite for working with the City Council.	6	Recognise that many competing views will exist and that reconciliation of all of these will be difficult as it has been on other projects.
12	Further legal challenge after Council democratic decision making process delays implementation of majority decision - whatever course of action Council decides upon	6	Seek external legal advice before decision making to minimise the chance for successful challenge
13	Expiry of existing CPO will cause substantial additional cost and time in achieving comprehensive development in accordance with Development Plan	6	Unavoidable if current scheme does not progress
14	Resolution of St Clements surgery issues more difficult if no commercial purchaser for existing building	4	Undertake options appraisal and consider revisions to capital programme.
15	Additional costs at public expense for public realm improvements e.g. Broadway if no S106 contributions from development	4	Consider revisions to capital programme
16	All decisions on Silver Hill are now made with the real risk of legal action being taken to contest their validity or to claim damages. Advice sought and received should be carefully considered before any decisions are taken but the outcome of any litigation cannot be guaranteed, notwithstanding the fact that proper advice has been received and considered.	6	Ensure that decision making considers unexpected or unlikely outcomes as well as those predicted by advisors

MAP REFERRED TO IN THE WINCHESTER CITY COUNCIL (SILVER HILL) COMPULSORY PURCHASE ORDER 2011



**KEY:**

- LAND TO BE ACQUIRED
- LAND SUBJECT TO NEW RIGHTS

The COMMON SEAL OF WINCHESTER CITY COUNCIL  
 was hereunto affixed this twenty first day of November 2011  
 in the presence of:-  
  
 a duly authorised officer

