

CABINET

13 January 2016

THE OVERVIEW AND SCRUTINY COMMITTEE

18 JANUARY 2016

SILVER HILL REGENERATION – STATUS REPORT

REPORT OF SILVER HILL PROJECT MANAGEMENT TEAM

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RECENT REFERENCES:

CAB2665 – Silver Hill – Judicial Review Decision, 3 March 2015

CL110 – Silver Hill – Development Agreement with Silverhill Winchester No.1 Limited, 18 June 2015.

CAB2700 - Silver Hill - Submissions By Silverhill Winchester No 1 Ltd and Council's Response, 13 July 2015 (part exempt).

CAB2752 – Silver Hill Winchester – Situation Report and Assessment, 2 December 2015.

EXECUTIVE SUMMARY:

The report sets out the current position in relation to Silver Hill, in particular with regard to the satisfaction of the conditions of the Development Agreement. It concludes that in all the circumstances, serious consideration should be given to terminating the Development Agreement.

Following the meetings of Cabinet and The Overview and Scrutiny Committee on 13 and 18 January 2016, and Full Council on 28 January, Cabinet will meet to agree its approach in the light of the Council's consideration of the report.

RECOMMENDATIONS:

TO CABINET

- 1 That Members consider the request from Silverhill Winchester No. 1 Limited to agree not to terminate the Development Agreement until at least 9 months after the disposal of court proceedings.
- 2 That Members consider what further action should be taken in respect of the Silver Hill Scheme (including in particular whether the Council should in any event implement the CPO, and the implementation of the existing planning permission) and whether there are any budgetary implications which full Council will need to consider as a result.

TO THE OVERVIEW AND SCRUTINY COMMITTEE

- 3 That The Overview and Scrutiny Committee considers the report and determines whether it wishes to raise any matters with the Leader, Cabinet or Council.

TO COUNCIL

- 4 That Council considers whether it supports the proposed approach of Cabinet to the future of the Development Agreement and the CPO.

CABINET13 January 2016THE OVERVIEW AND SCRUTINY COMMITTEE18 JANUARY 2016SILVER HILL REGENERATION - STATUS REPORTREPORT OF SILVER HILL PROJECT MANAGEMENT TEAMDETAIL:1 Introduction

- 1.1 At its meeting on 2 December 2015 Cabinet received an update on the progress of the Silver Hill developer, Silverhill Winchester No. 1 Limited (SW1), in meeting the conditions of the Silver Hill Development Agreement in relation to affordable housing and funding (CAB2752 refers).
- 1.2 Cabinet was informed of concerns at the lack of progress in meeting those conditions and it was agreed that the Leader should write to SW1 to clarify their intentions and their ability to perform their obligations under the Agreement. A copy of the letter written by the Leader is attached as Appendix 1. A copy of the reply from SW1 dated 22 December 2015 is attached as Appendix 2.
- 1.3 Members will be aware that SW1 have appealed against the High Court judgment of Mrs. Justice Lang arising from the judicial review action brought by Councillor Gottlieb. This appeal will now be heard by the Court of Appeal on 24/25 May 2016.
- 1.4 For various reasons, set out in their letter, SW1 is now seeking the Council's agreement not to terminate the Development Agreement between the Council and SW1 until the end of the period of at least nine months after the Appeal proceedings have been disposed of. If the Council agreed to this request, and given the current timescales, this would mean that the Development Agreement would continue in force until at least the end of January 2017. In practice, it is likely to be later than that date, because judgment of the Court of Appeal may well be reserved, to allow the Court time to consider its judgment. A further appeal to the Supreme Court might also be made by the unsuccessful party, adding further time to the process. Finally, although a period of nine months has been sought by SW1, in practice it is likely that this will be insufficient to allow all the work which would be needed to be carried out. If variations to the Scheme are to be sought, these would have to be considered and approved by the Council, and planning permission obtained, and if a funder were to require these approvals to be in place before entering into a funding agreement, the Council may be faced with a request for another extension on top of the minimum nine month period being requested.

Realistically, it could well be between mid-2018 and early 2020 before the development finally goes ahead.

- 1.5 Members will recall that there are two dates in early 2016 which are relevant to the Silver Hill Scheme. These are:-
- a) 9 February 2016 – by this date, the 2009 planning consent must have been implemented, in order to allow development to proceed under that consent;
  - b) 20 March 2016 – the CPO must have been implemented before this date, and notices served on all the properties within the scheme area, in order to allow the Council to acquire the outstanding land within the area under the CPO.

This report sets out the current position with respect to these two matters, and the actions being taken and proposed by SW1 in relation to them.

- 1.6 The Council therefore needs to consider SW1's request for an agreement not to terminate the Development Agreement, taking into account the implications for the regeneration of the Silver Hill area.
- 1.7 If the Council decides to terminate the Development Agreement, it will also need to consider at some point what future action to take in respect of the properties in Kings Walk and Middle Brook Street which it acquired in January 2014 and which are subject to a "put" option, allowing the Council to require SW1 to acquire the properties from the Council at the price the Council paid for them.
- 1.8 Further decisions will also need to be taken on other issues, as set out in Section 8 of the report.
- 1.9 In any event, whether or not SW1's request is agreed to, the Council will also need to decide what action (if any) it takes regarding the implementation of the CPO.

## 2 Letter from SW1 dated 22 December 2015

- 2.1 The Leader's letter to SW1 (Appendix 1) asked SW1 to confirm:-
- a) how the planning deadline (9 February 2016) was to be met;
  - b) how SW1 intended to progress the Silver Hill scheme, in the light of the appeal to the Court of Appeal, the fact that the Development Agreement had not gone unconditional, and the need to implement the CPO by 19 March 2016;
  - c) (subject to the appeal decision, and any necessary approvals required from the Council) what improvements it would seek to the 2009 scheme, and when the necessary approvals would be sought.

The letter formally reserved the Council's rights under the Development Agreement, including the right to terminate the Agreement.

- 2.2 As noted in the Introduction, SW1 has responded (Appendix 2 refers) to the Leader's letter. Its position, as set out in the letter, may be summarised as follows:
- a) SW1 considers that the Court's recent decision to allow SW1 to appeal to the Court of Appeal has a material effect on the strategy going forward;
  - b) In its view, the judgment resulting from Cllr Gottlieb's challenge has prevented SW1 from proceeding to go unconditional with the scheme;
  - c) The judgment has given rise to confusion as to what can and cannot be altered in development agreements for this type of scheme;
  - d) In SW1's view, joint advice obtained by the Council and SW1 from Counsel (suggesting that no changes can be made to the design and massing of the scheme) means that the [2009] scheme cannot be constructed in accordance with current statutory building standards without severe compromise to the quality and value of the scheme (if it is actually possible to achieve compliance at all);
  - e) SW1 considers that if the Council decided to terminate the Development Agreement in advance of the appeal (and a subsequent period of consequential action), the Council would be in breach of its obligations under the agreement to act in good faith;
  - f) Action taken by Cllr Gottlieb (and his legal advisor) has in SW1's view led to additional requirements being sought by the funding partner. Although both affordable residential and funding partners remain committed to the scheme (and have confirmed this in writing), SW1 have not yet been able to satisfy these additional funding requirements, although it expects to be able to do so "early in the New Year";
  - g) SW1 believes that the scheme will need to change to achieve an acceptable quality;
  - h) A varied scheme could include a reduction in car parking (reducing the scale of Block A), and some onsite affordable housing could still be provided. A bus station as proposed in the 2009 scheme is not feasible as Stagecoach would not agree to operate such a facility.
  - i) As these changes would impact on viability, the Council's consideration of a variation in the economic mechanism would be welcomed;
  - j) SW1 have submitted details under the pre-commencement conditions in the [2009] planning consent, with a view to implementing the consent by 9 February 2016. It will seek a change in timings for payments due

under the existing Section 106 agreement, and will also enter into a further Section 106 agreement to allow the 2014 consent to be issued;

- k) SW1 does not expect that the Development Agreement can go unconditional by 19 March 2016, although this “may be achievable”. SW1 encourages the Council to serve Notices to Treat on all plots [thus implementing the CPO in time], to assemble to the site, and ensure the CPO does not lapse. It considers that under the Full Indemnity Agreement with the Council, SW1 would be responsible for the costs incurred by the Council in serving these notices [but SW1’s response indicates that this would be the extent to which it would indemnify the Council (unless and until the Development Agreement went unconditional and the CPO process was continued)].

### 3 Observations on SW1 Response

- 3.1 Although SW1 indicate that both the affordable residential and funding partners remain committed to the scheme, neither of the two agreements with these partners, which must be in place to allow the Development Agreement to go unconditional, have been entered into. Given the matters set out in the letter, it would seem highly unlikely that the Development Agreement will become unconditional by 19 March 2016 (although the letter states that this “may be achievable”). This means that it is extremely unlikely that the CPO can be implemented in the manner anticipated in the Full Indemnity Agreement (whereby SW1 deposit the full amount of compensation and other costs, and the Council then serves notices and acquires the various properties in the scheme area).
- 3.2 In view of this, the SW1 letter explores a possible strategy if it proves impossible for the Development Agreement to be unconditional by March 2016.
- 3.3 In this section of the report, SW1’s response is considered. The first three bold headings below are the areas which the Leader’s letter specifically asked SW1 to confirm/comment on. Further comments from officers are set out in subsequent sections of the report, and legal advice from the Council’s retained legal advisors, Berwin Leighton Paisner LLP (BLP) is included in Exempt Appendix 4.
- 3.4 It should be pointed out that in its response, SW1 makes various assertions, some of which are contradictory to advice which has been given to the Council. In particular, SW1 refers to specific constraints and significant restrictions which it considers apply to changes to the approved scheme, whilst the advice the Council has received suggests that this overstates the position. Members are referred to Exempt Appendix 4 for detailed advice on these matters.

### **Meeting the Planning Deadline (9 February 2016)**

- 3.5 Applications have been received by the Head of Development Management in respect of all of the necessary pre-commencement conditions in the 2009 consent, and these are now being considered. The applications contain the details which are required to be submitted to the Council (as local planning authority) under the conditions in the planning consent. For some matters (e.g. sustainability, construction management, contamination) details must be submitted which cover the whole site. For other matters, details are required before commencement of a particular phase (e.g. finished levels, waste disposal arrangements, material samples, lighting, hard and soft landscaping, etc.). The details are normally determined by officers under delegated powers, as they are generally technical matters, and are not therefore referred to Planning Committee for decision.
- 3.6 Officers are considering the details which have been submitted, and it is hoped that decisions on these details can be made before 9 February 2016. This is the date by which the development must have been implemented, in order to allow the development under the planning permission to take place. If implementation does not occur by this date, the planning permission will effectively lapse.
- 3.7 In order to legally implement the permission, SW1 will have to carry out (on land which they control or to which they are permitted access) physical works, sufficient to legally constitute implementation of the planning consent. As noted above, such physical works have to be carried out by 9 February. It is understood that SW1 would intend to carry out such works by this date, in order to ensure that the planning consent is secured.
- 3.8 In order to preserve a planning permission, works to implement them must be lawful. Case law has considered the extent to which conditions requiring submission of details "before commencement of development" must be complied with in order for physical implementation to be lawful. In summary, provided all necessary details are submitted before the implementation works are carried out, and the details are approved (either before or after the works have been done) the planning permission will have been lawfully implemented.
- 3.9 Once implemented, the 2009 consent will be secured, and the development can continue. As development progresses, further detailed submissions in respect of future phases will need to be submitted to and approved by the Council (as LPA), but the timing of these would be geared to particular milestones in the development (e.g. the commencement of a particular phase) rather than a specific calendar date.

### **SW1's Intentions to Progress the Scheme**

- 3.10 In the letter, SW1 (and TH Real Estate) state that they remain committed both to Winchester and to continuing to work with the Council to implement a scheme of regeneration on the Silver Hill site.

- 3.11 In view of the developments in the appeal, SW1 considers that the Council's good faith obligations in the Development Agreement effectively prevent the Council from terminating the Agreement. Detailed legal advice on this aspect is set out in Exempt Appendix 4.
- 3.12 It seems clear from the letter that SW1 considers that changes to the 2009 scheme are necessary in any event. Changes may be possible (with the Council's agreement) depending on the outcome of the appeal. If the appeal does not allow such changes, the letter suggests that in SW1's view, a different approach in the partnership between SW1 and the Council would be required to allow such changes. Further advice on the constraints on changes which might apply if the appeal is unsuccessful is contained in the report from BLP in Exempt Appendix 4.

### **Improvements to be Sought to the 2009 Scheme**

- 3.13 Subject to the extent permissible in the light of the appeal decision, SW1 would seek to bring forward certain variations, which would include changes needed to allow compliance with Building Regulations. As detailed in Exempt Appendix 4, Members should note that SW1's interpretation of the advice received (jointly by SW1 and the Council, from Leading Counsel) in respect of changes to allow compliance with Building Regulations is more restrictive than that of officers and BLP (see Exempt Appendix 4).
- 3.14 The letter also makes it clear that "a bus station as proposed within the consented scheme is not however feasible as Stagecoach will not operate such a facility" (although clearly alternative arrangements for buses to drop off and collect passengers in the Town Centre would need to be put in place). The letter suggests some onsite affordable housing should be possible (but does not set out what level would be provided), and also puts forward the possibility of reducing the amount of car parking in the scheme (thereby reducing the scale of Block A, as the Council's requirement for one for one replacement of town centre car parking is a significant contributor to the overall massing). However, it also indicates that these changes may have an impact on the viability of the scheme and therefore a change in the financial arrangements between SW1 and the Council may be needed in order for such a varied scheme to go ahead. Again, these are not set out, but this may be an indication that SW1 would be looking to change the financial arrangements set out in the Development Agreement. Members will recall that the Agreement provides both for a rent to be paid (with a guaranteed minimum rent), and a profit share arrangement.
- 3.15 The letter does not indicate what (if any) other changes would be proposed. There is no comment on whether the changes to elevations and public realm (approved as part of the 2014 scheme) would be pursued (if this were to be possible in the light of the appeal decision). If (as appears to be the case) any varied scheme would not include a Bus Station within the development site itself, consequential changes to the scheme to make use of this space would presumably be put forward.



### **Alternative Strategy if Appeal is Unsuccessful**

- 3.16 The letter does not explain what will happen if the appeal is unsuccessful (either in whole, or so as to prevent any changes which SW1 consider essential from being implemented). If in that situation it proved impossible to meet the Funding, Social Housing and Financial Viability conditions, the development would obviously not proceed, and the Council (or SW1) would be able to terminate the Development Agreement using the provisions included in the Development Agreement (subject to the terms of any agreement between the Council and SW1 not to terminate before a certain date).

### **CPO Issues**

- 3.17 The SW1 letter emphasises the need for the CPO to not lapse, if the regeneration is to take place. As set out in Section 5 below, the Full Indemnity Agreement is structured on the assumption that the Development Agreement would go unconditional, and then SW1 would call upon the Council to exercise the CPO powers to acquire the outstanding interests, providing the necessary funding for the Council to do this. SW1 suggest that the Council consider the use of the Notice to Treat process to keep the site assembly provisions alive, and consider that the costs of the Council from serving these notices would be covered by the Full Indemnity Agreement (and payable by SW1). However, SW1 would not be asking the Council to serve notice of entry (and therefore take possession of the outstanding land interests) at this stage. If the Council itself was to choose unilaterally to move to this second stage of the CPO process and take possession of the outstanding land interests, it would therefore have to meet any compensation payments which became due as a result, as SW1 have not offered to forward-fund any of these expenses. Further advice on the potential liabilities that the Council may have is set out in Exempt Appendix 4.
- 3.18 SW1's evident lack of confidence that it will be able to go unconditional with the Development Agreement prior to 19 March 2016 is not unexpected, given the delay which has ensued since the Council's decisions in July 2015. Although there is a funder partner identified, It is understood that the risk management requirements that this funder has sought, partially determined by the local situation and the risk of further litigation, have proved onerous for SW1 and although SW1 considers that they can be satisfied, they do not appear to believe that there is any real prospect of this being achieved by 19th March.

## **4 Relevant Considerations For Future Action By Council**

- 4.1 In deciding whether or not to agree to SW1's request for a further agreed period to progress the scheme, the main considerations are as follows:-
1. Whether the Council wishes to continue with the regeneration of this site under this scheme, which has the benefit of planning permission,

and whether the Council considers this to be the best option for such regeneration.

2. The impact of waiting for the outcome of the appeal and any further period thereafter for consequential action on a potential timetable for the redevelopment of the area, noting that the period of an additional nine months (as proposed by SW1) is unlikely to be sufficient to complete all the matters that would require to be dealt with;
  3. Whether the Council has a legal obligation to agree to SW1's request for further time, given the appeal process and the Council's duties of good faith, which are specifically provided for under the Development Agreement (and the more general need for the Council to comply with all of its obligations under that Agreement);
  4. Whether the Council wishes to continue its commercial relationship with SW1 at least until the outcome of appeal is known, or decide now to restart the development process (including dealing with planning, procurement and site assembly matters) once it is in a position to do so;
  5. The extent to which the financial terms of the current Development Agreement are advantageous compared with what can be achieved in the market today (or more realistically, in two or three years' time which is the earliest that the commercial offer is likely to be put to the market) and how important it is to seek to retain such terms;
  6. The financial implications for the Council of any decision;
  7. The position of the Council in relation to EU procurement rules in relation to these options;
  8. What action (if any) the Council wishes to take in order to secure the CPO and retain the ability to acquire the outstanding interests in the area without having to go through another CPO process (or negotiations to secure such interests);
  9. The risks involved, as set out in Appendix 3, including the risk of further legal challenges against the Council's decision (solicitors acting for Cllr Gottlieb have previously indicated an intention to challenge various decisions which have been taken, subsequent to the judicial review judgment, although no proceedings or formal letters before action have been received).
- 4.2 It is important that the Council takes a balanced view of the merits of the courses of action it can now take in response to the information contained in the letter from SW1.

## 5 CPO

- 5.1 As explained above and in earlier reports, the Council has obtained a confirmed Compulsory Purchase Order (CPO) which allows it to acquire all the outstanding land interests in the site. Under the existing Development Agreement, leases would then be granted to SW1 to allow it to build out the development.
- 5.2 The purpose of the CPO is to assemble the land and property interests that are necessary for regeneration to take place. Land assembly by negotiation in a complex town centre site is extremely difficult, as it requires the successful conclusion of negotiations with landowners and other interested parties to secure the site. A CPO allows the Council to acquire all these interests, even if agreement cannot be reached (the process includes provision for the amount of any compensation due to be determined by a tribunal if not agreement), thus speeding up site assembly. The CPO also 'cleans up' interests which seem to have no owner or which are no longer clearly understood by the parties to them due to the passage of time since they were entered into. Both of these situations exist in the Silver Hill area. Without the ability to assemble land by a CPO (which would be the case if the current CPO is not implemented in time, unless a second CPO were to be promoted and confirmed), any scheme of comprehensive redevelopment will be at a much higher level of uncertainty and risk. If a second CPO was needed in order to acquire all the outstanding interests, the process of obtaining that CPO will be legally complex and expensive and it is difficult to quantify how much, if at all, that risk may be increased by it being the second CPO which would have to be sought.
- 5.3 The existing CPO must be implemented before 19 March 2016, otherwise it will lapse and cannot be used. If compulsory purchase powers were needed for a new development scheme, a new CPO would have to be made and confirmed, and the Council would have to persuade the Secretary of State to confirm the order, notwithstanding any objections that may be made to the Order. Before any new CPO could be made, additional other work e.g. review of planning brief, identification/procurement of new development partner, new planning application, etc., would have to be carried out. This would mean that obtaining a new confirmed CPO could well take at least four years from when the process is recommenced.
- 5.4 Members should also be aware that the decision as to whether or not the Council should proceed with the implementation of the CPO, is not dependent on the continuation of the Development Agreement. The Council, not the developer, has obtained the CPO on a lawful and sound basis for the regeneration of the Silver Hill area. The Council has taken Leading Counsel's advice on the relationship of the CPO to the specific SW1 scheme and the possibility that the CPO could properly be used to achieve land assembly for a different scheme (which retained the same regeneration purpose as the original), by either the same or a different developer on a different commercial basis and different planning consent. The advice, based on very recent case

law, is that the Council could do so, provided it can set out a firm and credible strategy for the regeneration process which it intends to follow.

- 5.5 Cabinet should therefore consider the use of the CPO not just in terms of the existing Development Agreement with SW1, but also with regard to the possible regeneration of the area by a different developer with a different scheme, which would be easier and quicker to move forward if land assembly is already achieved (or secured) by the implementation of the existing CPO.
- 5.6 Under the terms of the Development Agreement, SW1 is required to pay all of the CPO costs, including the compensation due to existing landowners (which would be the vast bulk of the CPO costs incurred). If the Agreement was to be terminated, the Council would have to fund (either itself, or through a new procurement partner) the costs of any CPO compensation, and (if required) a new CPO (if the existing CPO lapsed).
- 5.7 Section 5 of BLP's report at Exempt Appendix 4 sets out the alternative ways of implementing the CPO, and the implications for each. Section 6 of BLP's report goes on to give various numbered options which could be considered if the Development Agreement were to be terminated and the regeneration process restarted,

## 6 Consideration of Options

- 6.1 SW1 seeks the Council's agreement to awaiting the outcome of the appeal against the High Court judgment on the Judicial Review before determining whether to terminate the Development Agreement. The implementation of the CPO is in fact a major practical consideration which has a significant impact on the decision.
- 6.2 Relevant considerations for the Council were set out in Section 4 above. These are dealt with in more detail below.

### **Existing Financial Terms**

- 6.3 Members have previously received advice from external valuers which confirmed that the existing arrangements (had they been implemented at the time of that advice) would constitute best consideration under the legal provisions which applied. Since that advice was given (most recently in July 2015) changes have occurred, primarily in terms of residential values and construction costs), but it remains possible that the existing arrangements would still constitute best consideration. This is because the consideration being offered to the Council would be assessed against what the market would now pay for that particular scheme. If it would not be possible to secure better terms by marketing the development opportunity again, then by definition best consideration will still be being obtained.
- 6.4 From the advice previously received, the arrangements are advantageous to the Council, and if the Council were to terminate the existing agreement and start again, the Head of Estates considers that it is unlikely that such

advantageous terms could be obtained, without an increase in the scale/value of development and/or a reduction in costs of redevelopment e.g. by reducing the infrastructure. Members will need to review the information set out in the Resource Implications section in considering this factor.

### **Impact on waiting for the outcome of the appeal**

- 6.5 Section 6 of BLP's report in Exempt Appendix 4 sets out possible alternative numbered options for securing redevelopment of the area if the Development Agreement were to be terminated. Whichever of these options for restarting the process were to be chosen, it is clear that a great deal of work would be needed to begin the process again, and realistically (given other projects being undertaken at present) it is unlikely that any of this work would have been done by the time the result of the appeal is heard. On the basis that further extensions over and above the nine months' period (after the appeal is concluded) proposed by SW1 would probably be required, to allow all the necessary work and approvals to be dealt with, restarting the process may not in practice be significantly longer than continuing with the existing Development Agreement.
- 6.6 If the Agreement is terminated, there is no alternative course of action that is ready to be used. Further advice would need to be sought on the options available to the Council, and the Council would have to review the options and select an appropriate way forward. The selected option would then have to be undertaken, and it is extremely unlikely that the Council would be in a position to have another developer ready to proceed any earlier than if the Council had elected to agree to the proposed extension sought by SW1.

### **Council's obligations under the Development Agreement**

- 6.7 Detailed advice on the Council's obligations is set out in Exempt Appendix 4. In the light of that advice, it is not considered that the Council is bound to agree to SW1's proposal in order to comply with its obligations under the Development Agreement.

### **Continued relationship with SW1**

- 6.8 If a decision were to be taken at this stage to terminate, it would clearly end the existing relationship with SW1, although TH Real Estate would continue to hold property in the Silver Hill area. There are no provisions in the Development Agreement which would allow the Council, in the event the Agreement is terminated, to require TH Real Estate to transfer to the Council any land in the area which it holds. Furthermore, SW1/TH Real Estate would also have an interest in the site, if the Council decided to exercise the "put" option and require SW1 to purchase the Kings Walk properties from it. The Council would therefore have to negotiate with TH Real Estate/SW1 as a landowner, along with other landowners in the area, if the Council continued to seek to progress redevelopment of Silver Hill.

- 6.9 Members will wish to consider the history of the scheme, previous reports, and the action taken by SW1 in seeking to bring about the redevelopment, in deciding whether they wish to continue the current relationship with SW1.

### **Action to be taken in respect of CPO**

- 6.10 SW1 have confirmed their view (which they propose would be set out in an exchange of letters) that the Full Indemnity Agreement (FIA) would cover the costs of service of Notices to Treat under the existing CPO. However, they have not proposed to cover (or indicated that the FIA would cover, at least until the Development Agreement goes unconditional and SW1 implement the CPO provisions of the FIA) the costs of any compensation which would become due to landowners. Exempt Appendix 4 sets out the legal position and potential liability on the part of the Council if it decided to serve notices to treat under the existing CPO, and Members' attention is drawn to the issues set out if this course of action were to be pursued.
- 6.11 If the Council decided to terminate the Development Agreement but still serve Notices to Treat, and thereby implement the CPO, it would have to meet the costs of serving the notices itself. If the Development Agreement was not terminated, and the arrangements proposed by SW1 were agreed to, these costs could be recovered from SW1. The costs of serving the necessary notices in themselves would not be significant in the context of the scheme as a whole, although any compensation that became payable if the properties were acquired under the CPO process would be considerable. If the Development Agreement had not been terminated and had gone unconditional when the acquisitions occurred, SW1 would meet this compensation, but otherwise the Council would have to fund this, either itself or through a new developer partner.

## **7 Alternative Ways Forward**

- 7.1 The Council therefore has four possible pathways, two of which (Options A and B) can be discussed together as the underlying principles are similar:

### **Option A - Agree to SW1 proposals and extend time under Development Agreement. Serve Notices to Treat to Implement CPO**

### **Option B – Do not agree to a formal extension of time (await outcome of appeal and review thereafter) but still serve Notices to Treat to Implement CPO .**

- 7.2 If the Council agrees to retain the Development Agreement with SW1, it can proceed using one of the above options. In both cases, the CPO would be implemented (by the service of Notices to Treat) but Option A would see an agreement with SW1 not to terminate the Development Agreement for a specific period (as suggested in SW1's response letter) whereas Option B would mean that the Council would await the result of the appeal and then review its position in the light of that decision. As noted above, it is likely that

the minimum nine months' period proposed by SW1 would not be sufficient for the work that would be required if the Appeal were to succeed.

- 7.3 In Option A, the Council agrees to SW1's proposal and implements the CPO by means of notice to treat on the basis of a settled intention that SW1 will progress a regeneration scheme based on revisions to the consented (by that time) scheme, if such revisions are permissible in the light of the Appeal decision. It does not terminate the Development Agreement and formally agrees with SW1 (on terms to be agreed between SW1 and the Council) that it will not do so if the decision on the appeal against the Judicial Review provides an opportunity for revisions to the existing scheme to be made. If the appeal is unsuccessful and it is by then impossible or mutually undesirable to implement the 2009 scheme then (subject to the terms of the "non-termination" agreement) the agreement with SW1 can be terminated by agreement or with negligible risk. After termination, the Council can then either continue with the CPO process (subject to identifying the funding) after which it takes the redevelopment opportunity back to the market (thus saving considerable time and cost) or abandons the CPO and restarts the project at some point in the future. In the unlikely event that any interests have actually been acquired via the CPO in that time, then these can be offered back to the vendor in accordance with Crichel Down principles or retained by the Council if the vendor is not interested in their return.
- 7.4 If the appeal is successful and permits variations to be made to the existing approved scheme, it will be necessary to consider the variations which are sought, and approve these under the terms of the Development Agreement. Planning applications would also be required to obtain any necessary planning permission for the variations. Depending on what variations are sought, those opposed to the scheme may again seek to challenge the Council's actions in pursuing the scheme.
- 7.5 The existing provisions of the Development Agreement with SW1 require that the Development Agreement has become unconditional before the Council activates the CPO. Since the Development Agreement has not (and is extremely unlikely to) become unconditional before 19 March 2016, the Council's external legal advice from BLP (Annex to Exempt Appendix 4, para 7.4) is that the existing Indemnity Agreement would not be a sound basis on which to proceed after that date.
- 7.6 Unlike in Option A, Option B would not commit the Council beyond the decision in the Appeal. The Development Agreement would continue until the Council had been able to review the position in the light of the Appeal judgment. Under Option B, the Council would notify SW1 of its intention to review its position once the outcome of the Appeal is known.
- 7.7 In either option, the Council would implement the CPO by the service of Notices to Treat. Members will need to consider whether this is a reasonable course of action. Central to that decision should be whether the Council considers that the regeneration of the area is of such critical importance that

the CPO process should be continued. Further advice would be required, however, as to the implications of serving Notices to Treat, if either of these options were to be chosen, before notices were served.

- 7.8 Any advantage in either Option A or B exists only to the extent that they allow time for the appeal process to be determined and will only apply to the extent that it succeeds and allows the development to proceed. Although permission has now been granted for SW1 to bring its appeal before the Court of Appeal, and therefore the Court accepts that there is a case to be considered, that in itself does not guarantee that the appeal will be successful. Further legal advice on this is included in Exempt Appendix 4.
- 7.9 The Council could elect to agree to SW1's request, and agree not to terminate before the appeal is determined, but decide not progress the CPO process in the meantime by serving notices to treat. If however the Development Agreement has not gone unconditional before 19 March, this would mean the existing CPO would lapse. The implementation of some scheme in the future within the parameters of the Development Agreement (varied or otherwise) by SW1 would still be possible. However, it is difficult to identify any significant advantages in terms of deliverability to the Council of this scenario over terminating the Development Agreement (under Options B or C below). If the existing CPO lapsed, SW1 would need to ask the Council to make and pursue a second CPO (unless it could assemble the outstanding interests by private negotiation), which would entail greater costs (and require more time than the period of nine months after the Court decision which SW1 were seeking). Therefore, unless Council both extends time under the Development Agreement AND maintains the CPO by service of notices to treat, it is unlikely that development under the Development Agreement could be achieved.

**Option C - Terminate the Development Agreement but Implement CPO by service of Notices to Treat**

- 7.10 The Council terminates the Development Agreement with SW1 now, but implements the CPO by notice to treat, using Council funds for acquisitions as and when they are necessary. As explained above, the advice received from Counsel is that this would require the Council to proceed only after setting out a firm and credible strategy for the regeneration process.
- 7.11 Under this Option C, the Council would be taking the view that SW1's letter of 22 December 2015 does not offer any reasonable prospect that SW1 will be able to meet the requirements of the Development Agreement, but that the CPO needs to be implemented to secure site acquisition for possible future regeneration. Members will need to be mindful that such a decision may give risk to possible action from SW1 against the Council for breach of its Development Agreement obligations, and they should refer to Exempt Appendix 4 for detailed legal advice on the merits of SW1's arguments in this respect.



- 7.12 In order to progress this option, the Council would have to be in a position to acquire all of the property and interests in the site itself, unless a new development partner could be procured. Although the property purchased would represent assets worth their acquisition price in the context of a regeneration scheme, the Council's current financial plans have no capacity to fund this. Therefore, if this were to become a priority for the Council, it would be necessary to make significant changes to both the Medium Term Financial Strategy and the Asset Management Plan and would be likely to require significant changes to both the capital and revenue expenditure that is currently planned.

**Option D - Terminate the Development Agreement AND CPO process, pursuing new CPO process if required**

- 7.13 Terminate the relationship with SW1 and discontinue the CPO process, accepting that it is not feasible to consider a comprehensive regeneration at this time and accepting the need for a CPO or alternative strategy at some time in the future.
- 7.14 Under this Option D, the Council would again be taking the view that SW1's letter of 22 December 2015 does not offer any reasonable prospect that SW1 will be able to meet the requirements of the Development Agreement, and again the risk of challenge by SW1 should be considered by Members.
- 7.15 Section 6 of BLP's report (Annex to Exempt Appendix 4) would be relevant in this option, as it gives various possible options which the Council could choose, having terminated the Development Agreement process.
- 7.16 Although taking this option would have significant disadvantage in terms of loss of an existing development partner, the Council would here be accepting that the best approach to comprehensive regeneration of the Silver Hill area is to terminate the Development Agreement and restart the process again.
- 7.17 Other than a challenge from SW1 itself, choosing this option would reduce any risk of further challenge on the use of the existing CPO, or the continued reliance on the Development Agreement. Although a new CPO process may have to be undertaken (possibly at the Council's own cost) this would allow a re-evaluation of the development of the Silver Hill area, and the undertaking of a legally compliant process to secure the redevelopment.
- 7.18 The scope for flexibility and room for manoeuvre without further litigation is uncertain and constrained and it seems likely that it will continue to be argued by objectors (unless the appeal clarifies the legal position in some way that resolves the matter) that the lack of an EU procurement process in 2004 is an impediment to the operation of the Development Agreement.
- 7.19 Furthermore, as noted above, it is likely that even if the arrangements proposed by SW1 (agreement not to terminate before nine months after appeal has been settled) were to be accepted by the Council, it is likely that

further extensions of time would be needed in order to consider and approve any variations proposed, deal with any further challenges, etc.

- 7.20 Whilst it should be noted that the favourable commercial terms the Council has within the Development Agreement may not be obtained again, and that it may be some years before an alternative regeneration proposal for the area can be brought forward, it seems unlikely that development under the existing Development Agreement under Option A will be anything other than time consuming and uncertain, making it a less favoured option in those circumstances than a clean break and restart at some time in the future.

## 8 Conclusions on Options

- 8.1 Retaining the existing Development Agreement, by agreeing SW1's proposals as set out in its response letter, would maintain the possibility of a redevelopment of Silver Hill based on the development already approved. Provided the CPO were to be implemented, it would also ensure the funding of the CPO acquisitions would be met by SW1 and its funders, rather than the Council. However, it is clear that this would be dependent on the appeal succeeding to the extent as to allow changes envisaged by SW1 and its funders. The changes may include changes to elements which have previously been key issues for the public (such as a bus station and affordable housing), as well as to the financial arrangements for the Council. Further legal challenges could not be ruled out if this option were to be chosen.
- 8.2 Irrespective of any risk of challenge, the Council would also take its own view, considering legal advice, as to whether EU procurement rules would permit it to undertake options under the Development Agreement or whether the Agreement would have to be terminated and a new procurement process undertaken.
- 8.3 Some six months have elapsed since the Council originally agreed the identities of social housing and funding partners, and the heads of terms of agreements between SW1 and these organisations. SW1 have been unable to enter into these agreements since these approvals were given. There is no guarantee that even if the appeal is successful, these agreements will be signed and the Development Agreement can then go unconditional, and there is therefore uncertainty about the acceptability of any revised form of development that may be proposed.
- 8.4 It is highly likely that the delay envisaged by SW1 (nine months after conclusion of the appeal) will not be sufficient to reach a position where the Agreement can go unconditional and the development can proceed. Considering and approving possible variations, possible legal challenges, and the need to secure social housing and funding partners on acceptable terms, could all mean that a period considerably longer than nine months would be required. Although it is probable that if the appeal succeeds, variations can be sought and approved, and social housing and funding agreements entered into, development would then commence at an earlier date than would be the

case if the Agreement was terminated and the Silver Hill Project restarted, any time advantage may not be significant.

- 8.5 Restarting the project would allow the Council, developers, and the public to reassess what can be achieved on the Silver Hill site. Work on the planning position, planning brief, negotiations with landowners, procurement of a developer and (unless the Council itself implemented the CPO) land assembly/CPO would clearly not be a quick process, but it may be the better long term solution.
- 8.6 If the Agreement is terminated, the issue of the existing CPO will need to be addressed. If Members did wish to terminate the Agreement but preserve the CPO by serving Notices to Treat, a further report would be brought to Members so they were able to consider all the relevant issues for this course of action. The alternative would be to allow the existing CPO to lapse, and seek a new CPO (if required) once the future redevelopment plans for the area had been settled.
- 8.7 Members may wish to bear in mind that no alternative regeneration proposals have come forward from any source. It does not necessarily follow from this that no such proposals will ever come forward in the future, but Members will wish to consider this in any event.

## 9 Consequences to be considered

- 9.1 If the current Development Agreement is terminated then it will crystallise the downside risks which have been previously identified. Some of these are relatively immediate and foreseeable. Others, such as the actions of occupiers and owners in the Silver Hill area once they consider the impact of delay in regeneration, are difficult to anticipate. Members need to be mindful of the issues that impact directly on the Council and those which may impact on the city, such as uncertainty over the future of the bus station or delays in improvements to traffic management. Some of the more immediate matters are outlined below but most will need to be addressed in more detail in future reports.

### **Put Option for Kings Walk/Middle Brook Street Properties**

- 9.2 The Council has forty days from the date on which the Silver Hill Development Agreement terminates to determine whether to either retain the land purchased from London and Henley (the leasehold interests in Kings Walk, and the freehold interests of part of the Friarsgate Car Park and other properties in Middle Brook Street) which were acquired in January 2014) or exercise the 'put option' to require SW1 to purchase these properties from the Council at the acquisition price.

If the land is retained, in what will be a 'no scheme world', then its value may be less today than the put option price and this would need to be reflected in the Council's accounts (and as the Council has not financed this purchase in the expectation of the put option, financing the cost would need to be

budgeted for). Whilst it would be clearly desirable to retain the land in the interests of long term land assembly, as it links with other properties interests that the Council has in the area, the affordability and ultimately value for money of this option will also be a key consideration.

### **Friarsgate Car Park**

The Council will have to consider the future of the former Friarsgate Car Park. The Council owns the freehold of part of this, and the leasehold of another part (the freehold of this part being one of the properties subject to the “put” option referred to above). Part of the Car Park is likely to require partial demolition in the interests of safety, and this will need to be budgeted for within the Council’s Asset Management Plan.

### **Bus Station**

- 9.3 It will be important to determine the attitude of Stagecoach to the operation of the existing bus station (which is known to be in poor condition) once it is apparent that there are no plans which lead to a replacement in any form or which enable Stagecoach to release value from the site. From the letter from SW1, it would appear that Stagecoach would be unlikely to invest itself in new replacement facilities in the absence of the scheme.

### **St Clements Surgery**

- 9.4 The owners of the St Clements surgery and GP practice will have to determine their options and attitudes towards the option of relocation to new premises. A planning application for the new surgery building to be constructed by the Council has been submitted, but construction of a new surgery would only be proceed if the practice could enter into a building agreement with the Council, on terms that were acceptable to all parties.

### **Other Landholding Interests**

- 9.5 Other owners of property or interests which have assumed that the area will be regenerated in the near future will have to reappraise their plans if the scheme does not proceed.
- 9.6 Further reports on how the Council addresses the regeneration of the area will be made in due course, but Members should not expect any detailed analysis of the options for a redevelopment process for the area to come forward until the Autumn so that the impact can be fully assessed. Such further reports will also deal with the management and lettings of the Council's ongoing properties within the area pending any redevelopment, and what length of tenancy can be offered to occupiers to maximise occupation during the interim period.

## 10 Basis for Termination

- 10.1 If the Cabinet decides to recommend termination of the Development Agreement, then the Development Agreement and the letter of the 22nd December 2015 provides a clear basis for this. The long stop date specified in the contract has passed and the Council has not agreed any extension of time or forbearance by which it is now constrained. In these circumstances either party can terminate the Agreement. The Council is under no obligation to accept an alternative indemnity arrangement or to delay any decisions until the outcome of the SW1 appeal is known. Nevertheless the Council must have regard to whether that decision to terminate would be reasonable in a public law sense because of the serious financial and regeneration consequences of that decision.
- 10.2 Given that SW1 has confirmed that it is unlikely to be able to achieve unconditionality before the expiry of the CPO and the uncertainty over the outcome of the appeal, it would now not be unreasonable for the Council to determine that SW1 is unlikely to be able to fulfil its obligations under the Development Agreement and that terminating that Agreement and restarting the process at some point in the future would be the strategy more likely to eventually lead to an implemented regeneration scheme.
- 10.3 It should be clearly understood however that this is not the same as saying that an alternative regeneration scheme can be delivered quickly or on better terms. It is possible that terms agreed with a future developer may not be as good as the existing terms, and it may take longer to secure redevelopment. However, SW1's continued involvement rests on a successful outcome to the appeal case, and Members may consider that in the light of all the circumstances, continuing with SW1 is no longer considered the best strategy.
- 10.4 BLP do not consider that the Council will have acted in breach of its good faith obligations in these circumstances and therefore that the risk of successful legal action against the Council by SW1 is low. However as there is no way to be certain whether SW1 would commence any action and what the outcome would ultimately be, the risk and impact of litigation should not be disregarded.
- 10.5 Exempt Appendix 4 sets out the detailed grounds on which the Council could terminate the Development Agreement. If Members decide to terminate the Agreement, they will need to consider and specify the grounds on which termination is based.

## 11 Works Commencement Date

- 11.1 Cllr Gottlieb asked at the last Cabinet meeting for a response on his proposition that the Council should terminate the Agreement because the Works Commencement Date was not in fact satisfied in June as required by the Development Agreement. He has also raised questions relating to the interpretation of advice given by Ms Natalie Leiven QC provided at the Cabinet and Council meetings on 15 and 16 July 2015.

11.2 Detailed advice on this matter is included in Exempt Appendix 4.

## 12 Conclusion

- 12.1 Conclusions on the decision as to whether or not to terminate the Development Agreement, and whether to implement the CPO, are set out in Section 8 above. In summary, terminating the existing arrangement and restarting the project may be the better long-term solution.
- 12.2 It is not expected that the disentanglement of the contractual position with SW1 will take an extended period unless there is litigation from SW1 in response to a decision by the Council to terminate the contract. The Council has recently invoiced SW1 for a substantial sum in relation to expenditure in the second half of 2015, mainly in relation to consultants and advisors, and other than the payment of costs to Cllr Gottlieb (further details of which are set out in Exempt Appendix 4), this is the only obvious financial issue relating to the Development Agreement to be resolved.
- 12.3 The possibility of a claim for damages or some other litigation by SW1 cannot be ruled out and Cabinet should be aware that this possibility exists unless termination is by mutual agreement.
- 12.4 Given the complex matters that will have to be addressed regarding the planning and regeneration of the area, it may be some time before the Council can consider formally when and how it will start the regeneration process over again, although actions by others may precipitate the need for a reaction from the Council.

## OTHER CONSIDERATIONS:

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

- 13.1 The regeneration of the Silver Hill area is a much needed revitalisation of a part of Winchester's town centre which is neither aesthetically pleasing nor economically functional. The requirement to provide employment, housing retail premises and improved public realm in a highly sustainable location is set out in the Council's Local Plan and is consistent with the National Planning Policy Framework.

### 14 RESOURCE IMPLICATIONS:

- 14.1 There could be significant resource implications arising from any consequential decisions from this report. The Council's budget projections currently assume the 2009 scheme development progresses in accordance with the Development Agreement. Any change in this position will have a direct impact on the resources available to the Council, which will be considered when the budget is presented in February.

15 RISK MANAGEMENT ISSUES

15.1 Appendix 3 is a table of risk management issues, in the Council's adopted format.

BACKGROUND DOCUMENTS:

Letter from SW1 dated 22 December 2015 (see Appendix 2)

APPENDICES:

Appendix 1 – Letter from Leader to SW1 3 December 2015

Appendix 2 – Reply from SW1 22 December 2015

Appendix 3 – Risk Management Table

EXEMPT Appendix 4 – Legal Advice



**Winchester**  
City Council

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3 December 2015

Dear Mr Sales

**SILVER HILL, WINCHESTER – DEVELOPMENT AGREEMENT DATED 22 DECEMBER 2009 (AS AMENDED)**

I write with reference to previous correspondence between Silverhill Winchester No. 1 Limited (SW1) and the Council in respect of the Funding Condition, Social Housing Condition and the Financial Viability Condition within the above Development Agreement, and the Council's subsequent approval of the identity of the proposed Fund and RSL, and (subject to specified modifications) the heads of terms for agreements with these bodies as required by the Funding and Social Housing Conditions, as set out in the letter from the Council's Head of Legal and Democratic Services of 16 July 2015. As set in that letter, agreements would then need to be entered into by SW1 and the Fund and RSL respectively, in accordance with these approvals, before the Conditions were satisfied.

Following these approvals, indications had been that the agreements would be in place within around six weeks of such approval. However, neither agreement has yet been entered into.

There are clearly two key dates that must be met if the 2009 development is to proceed in accordance with the approvals that have been given. Firstly, the planning permission for the 2009 scheme must have been implemented in compliance with the time limit condition (i.e. before 9 February 2016). This means that before implementation, all necessary pre-commencement approvals must have been sought and given. I understand that work is ongoing in this respect, but would request confirmation from SW1 as to how this deadline will be met.

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The second key date is the expiration of the compulsory purchase order, which must have been implemented by 19 March 2016. The Full Indemnity Agreement requires SW1 to place all the estimated funds necessary to meet all potential compensation claims with SW1's solicitors (thus making them available to the Council for payment of compensation as and when required).

Clearly, assuming the planning issues can be resolved in time, it is also essential that the CPO is implemented by 19 March 2016, if the development envisaged by the development agreement is to proceed. The fact that SW1 have secured permission to appeal to the Court of Appeal against the High Court's decision on the challenge brought by Cllr Gottlieb will not alter this fundamental requirement.

At its meeting of 2 December 2015, Cabinet considered a report on possible options open to the Council. The report is available at the following link:-

<http://www.winchester.gov.uk/meetings/details/1390>

Cabinet agreed that I should write to you, seeking confirmation as to how SW1 intends to progress the Silver Hill development in the light of the granting of permission to SW1 of permission to appeal to the Court of Appeal, the fact that the 2009 scheme has not yet gone unconditional, and the need to implement the CPO by 19 March 2016.

It also agreed that I should ask SW1 to confirm (subject to the Court of Appeal's decision, and any approvals required from the Council under the development agreement) what improvements to the 2009 scheme it would seek, and when such approvals would be sought from the Council.

A further report on the options available to the Council will be brought to Cabinet on 13 January 2016, and in order to give all the relevant information to Members in that report, I would ask that a response to this letter is sent to me by no later than Friday 18 December 2015.

For the avoidance of doubt, the Council fully reserves its rights and remedies under the Development Agreement, including in particular the provisions allowing it to terminate the agreement. As is the case under the Development Agreement, any actions taken or expenditure incurred by SW1 in pursuing the scheme is at SW1's own risk.

I look forward to hearing from you by 18 December 2015, accordingly.

Yours sincerely,

Cllr Stephen Godfrey  
Leader of the Council

**Silverhill Winchester No.1 Limited**

201 Bishopsgate London EC2M 3BN  
COMPANY NUMBER 04057646

Councillor Stephen Godfrey  
Winchester City Council  
City Offices  
Colebrook Street  
Winchester  
SO23 9LJ

Tuesday 22nd December 2015

Dear Cllr Godfrey

**Re Winchester Silverhill**

Further to your letter of the 3<sup>rd</sup> December 2015 I write to set out the response to the questions you have asked of Silverhill Winchester No. 1 Limited (SW1) as Developer of the above project.

The recent hearing where SW1 was granted leave to Appeal the procurement judgement has a material effect on the strategy going forward, so before answering your questions I think it is important to state what I believe to be the situation regarding this Appeal.

Lord Justice Lewison recognised that the original hearing had failed to resolve significant disagreements between the parties on points of fact, which should accordingly be heard again before the three appeal judges. The fundamental issue of whether Cllr Gottlieb has standing to challenge the Development will also be re-examined, Lewison LJ having re-introduced this specifically as a point worthy of consideration. It is clear that the first Instance judgment remains valid unless it is overturned by the three appeal judges but for now it cannot be taken as the definitive view.

The advice that I have received is clear in that the action was taken by the incumbent Councillor against Winchester City Council (WCC) only but the judgement that resulted from the action has prevented SW1 from proceeding to go unconditional with the scheme consented in 2014 in accordance with the contractual terms of the Development Agreement. I am quite convinced that if the action had not been taken the scheme would be on site at the current time and the first units would be ready for occupation in the spring of 2016.

The judgement gave no guidance as to how WCC were to fulfil its contractual responsibilities with SW1, leading to significant confusion both between the parties and the development industry as to what could and could not be altered in development agreements for this type of town and city centre schemes. There should be no doubt that all schemes of this complexity and scale do need to change during the development process, so WCC and SW1 rightly sought clarification from Counsel as to the interpretation of the judgement in relation to the Development Agreement.

As you are aware, we have been taking forward the scheme originally consented in 2009 strictly in accordance with the Development Agreement provisions. However, the Counsel Joint opinion of the judgement suggested that no changes should be contemplated to the scheme in design and massing terms. This advice left the scheme incapable of construction to even

meet current statutory building standards without severe compromise to the quality and value of the product, if it was possible to achieve.

You will no doubt be seeking your own independent legal advice but you will appreciate that given the position I have described above, my view is that the appeal is essential in determining how the various provisions of the Development Agreement operate in connection with taking any scheme forward successfully.

As the judgement was against the actions of WCC and not SW1 and that WCC are not in the position of being able to determine an acceptable level of scheme changes needed to implement the Development Agreement contractual terms, I have been advised that to determine the agreement in advance of the appeal and any period of consequential action resulting from it would be in breach of the good faith provisions contained within it.

As you are aware we have agreed terms with a funding partner and affordable residential partner. The identity of both of these parties has not been made available in the public realm. However, Cllr Gotlieb and a solicitor acting for him have made unsolicited contact with the funding partner in order to de-stabilise the terms established. I believe this to be an action using privileged information made available to council members only and has led to a further requirement being added to enable the funding agreement to be unconditional. I find this unacceptable and extremely difficult to fulfil the terms of the development agreement when a member of the Council is clearly using privileged information to usurp the process.

Both affordable residential and funding partners remain committed to the scheme and have confirmed this in writing. However, the compromises explained above means that we have not been able to satisfy a residential and construction partner's requirements and time is running out to do so. I do remain confident that it is possible to reach agreement on these aspects early in the New Year.

Notwithstanding the current situation, I do not believe the quality of development resulting from the counsel's opinion is good enough for Winchester and does not meet the quality standards required by TH Real Estate. Therefore, regardless of the fact that we are very nearly in a position that we can bring forward the required agreements, the scheme does need to change to achieve an acceptable quality and this requires either the relaxation of part or all of the judgement or a differing approach to the partnership between WCC and SW1.

If the appeal was successful, I believe a variation of the consented scheme would allow us to bring forward a development with WCC allowing an amount of on site affordable housing to be provided. I also believe a reduction in public car parking could be commercially acceptable to enable the scale of Block A to be reduced. Both of these issues address the principal concerns of the general public to the proposals. Unfortunately, a bus station as proposed within the consented scheme is not however feasible anymore as Stagecoach will not operate such a facility. These variations will have a material effect on the viability of the scheme and I welcome WCC's consideration of a variation in the economic mechanism to facilitate the above positive changes. I do believe that these changes would result in a scheme that all stakeholders would be delighted with and would justify the extremely painful process, which we have all endured.

SW1 have invested over £10m of our mainly pension fund invested capital in working up development proposals to date and I am sure you appreciate that for most pensioners this represents a significant cost if the scheme were to be aborted, even in part. But I do think that WCC and SW1 need to work together democratically to ensure that we deliver a satisfactory outcome for the good of the whole City and that we should not be forced to

Yours Sincerely

Mike Sales  
Director  
Silverhill Winchester No. 1 Limited

deliver an inferior product by the intervention of a single individual attempting to dictate what should and should not be allowed in Winchester.

For us to continue to fund further improvement to the scheme as well as presenting a necessary and robust case at the appeal hearing our investors will need the confidence that their position and invested capital is secure. To enable this, we will need WCC to agree to not determine the development agreement for a period of at least 9 months after the court proceedings have been disposed of. As you are aware, we are clearing all remaining pre-commencement planning conditions for the consented scheme (which have now all been submitted), seek an amendment to the payment timescales in the section 106, implement that consent before 9<sup>th</sup> February 2016 and enter into the new section 106 to enable the 2014 variations to be granted.

Turning to the Compulsory Purchase Order (CPO), I believe it would be disastrous to the City if this was to lapse given the pressing issues surrounding the condition of many of the buildings on the site and the needs of both occupiers and users of these services which include St Clement Surgery, the bus station as well as the council's own public carpark. Even in a scenario where SW1 were not the Developer going forward, I believe it is in the City's best interest to have assembled the development site if it is to be comprehensively regenerated within the next 5 years. If Notices to Treat under CPO legislation are served for each plot, the CPO will not lapse in March 2016. I would encourage the council to consider this established process as a method of keeping the site assembly provisions alive.

We have considered whether the agreements between WCC and SW1, in particular the Development Agreement and the CPO Indemnity Agreement dated 18 November 2011 (as amended) will accommodate the service of such notices by WCC in advance of this date. Clause 10 of the Development Agreement and Clause 24 of the CPO Indemnity Agreement prescribe the CPO process after the date on which the Development has gone unconditional. However, I have been advised that neither of these agreements prevent WCC from serving Notices to Treat before that date.

With the expectation that it will not be possible for the Development Agreement to go unconditional by the 19<sup>th</sup> March 2016 (although this may be achievable), I suggest that WCC and SW1 confirm in an exchange of letters their interpretation and understanding of the Development Agreement and the CPO Indemnity Agreement. These letters will record that SW1 consents to WCC serving the Notices to Treat (but not any subsequent Notices of Entry). It will also record that under clause 9 of the CPO Indemnity Agreement SW1 will be responsible for the costs incurred by WCC from serving these Notices.

The alternative is for WCC to underwrite the compulsory purchase without a developer indemnity and you may wish to consider this action.

Finally, can I reiterate that SW1 and TH Real Estate as its manager are committed to Winchester and despite the challenging circumstances we both find ourselves in, I believe in investing in the long-term success of the City. Whilst we have tried our investor's patience, I am sure that there is a solution which matches their investment requirements today and the long-term aspirations of the vast majority of the people of Winchester. I hope you and your fellow councillors will consider the strategy that I have outlined above and understand that it represents my view of the most acceptable way of bringing forward a development on the site in a reasonable time frame.

### Silver Hill – Risk Evaluation

<b>Risk Ref:</b> CR5002	<b>Risk Score 2015:</b>	Likelihood= Likely Impact = Significant	<b>Previous Score:</b>	Likelihood = Highly Likely Impact = Significant	<b>Risk Owner:</b> Corporate Director	
<b>Risk Title: Silver Hill</b>						
Risk No.	Description of risk	Likelihood	Impact	How will the risk be managed?	Assigned to	
<b>If the contract is not terminated and the conditions of Development Agreement are met before 19<sup>th</sup> March 2016:</b>						
1	Funder/Developer/RP awaits outcome of Judicial Review appeal before determining whether to proceed with scheme (i.e. outcome of appeal determines whether any scheme proceeds)	Highly Likely	Low	This is effectively the position that SW1 has outlined and on which Council would agree to proceed. Low impact because failure to proceed after JR (i.e. crystallisation of risk) produces only delay in terminating agreement which is not likely to be significant.	Project Team	
2	Developer fails to start development (as determined after resolution of Risk 1) to timetable set out by Development Agreement	Unlikely	Major	Development Agreement provides for Council to obtain rights to design and contracts, and to reclaim any site leases granted so that an alternative developer can be obtained and/or Council can step in to complete development.	Project Team	
3	Lack of capacity within City Council to manage simultaneous major projects 'on site' if these overlap	Likely	Moderate	Consider and plan for resource requirements through Programme Management Group and allocate appropriate budgets	Corporate Management Team	
4	Legal action from objectors to prevent implementation of Council's decision	Highly Likely	Moderate	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	Project Team	
5	Anticipated profit on scheme is not achieved because of higher costs (including interest payments), lower values or a mixture of both resulting in lower overage to Council	Likely	Low	Any anticipated overage not assumed in baseline medium term financial forecasts. Ongoing monitoring of Development Account. Monitoring of cash flows and escrow arrangements	Chief Finance Officer	

<b>Risk Ref:</b> CR5002		<b>Risk Score 2015:</b> Likelihood= Likely Impact = Significant	<b>Previous Score:</b> Likelihood = Highly Likely Impact = Significant	<b>Risk Owner:</b> Corporate Director		
<b>Risk Title: Silver Hill</b>						
Risk No.	Description of risk	Likelihood	Impact	How will the risk be managed?		Assigned to
6	Council fails to account correctly for complex transactions flowing from the scheme and full budget impact is not assessed	Unlikely	Moderate	Comprehensive technical assessment of accounting, early discussions with auditors, obtain adequate resources within Finance team to support project.		Chief Finance Officer
<b>As above, and Developer and Council are able to negotiate modifications of proposals after Judicial Review:</b>						
7	Developer may be unable or unwilling to make necessary modification to satisfy Council	Unlikely	Major	Council would not be required to accept variations to the scheme. Council would reappraise outcomes before making final decision		Project Team
8.	Further legal challenge made to prevent regeneration proposals going ahead	Likely	Moderate	Difficult to quantify because depends on nature and extent of judgment in Judicial Review. Objectors unlikely to accept either appeal judgment.		Project Team
<b>If the Council terminates the contract before or immediately after 19<sup>th</sup> March:</b>						
8	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.	Highly Likely	Major	Seek consensus for delivery of scheme which meets all reasonable expectations		Project Team/Cabinet
9	Failure to meet contractual obligations under Development Agreement creates scope for damages claim against Council	Unlikely	Major	Meet contractual obligations and act in accordance with prudent legal and financial advice. Ensure potential financial consequences of this are understood by decision makers.		Project Team/Cabinet
10	Negative impact on Council's finances caused by additional estate management costs (including potential demolitions and consequential costs) and temporary loss of income from rent	Likely	Moderate	Medium Term budget Strategy would need revision.		Chief Finance Officer
11	Expiry of existing CPO will cause substantial additional cost and time in achieving comprehensive development in accordance with Development Plan	Highly likely	Major	Unavoidable if current scheme does not progress		Project Team
12	Unrealistic assessment of timescale for delivery of alternative commercially feasible development proposals with possible financial or economic	Highly likely	Major	Recognise that many competing views will exist and that reconciliation of all of these will be difficult as it has been on other projects.		Project Team/Cabinet

<b>Risk Ref:</b> CR5002		<b>Risk Score 2015:</b> Likelihood= Likely Impact = Significant	<b>Previous Score:</b> Likelihood = Highly Likely Impact = Significant	<b>Risk Owner:</b> Corporate Director	
<b>Risk Title: Silver Hill</b>					
Risk No.	Description of risk	Likelihood	Impact	How will the risk be managed?	Assigned to
	consequences, including investor appetite for working with the City Council				
13	Failure to deliver market residential dwellings creates additional pressure for site release	Likely	Moderate	Ensure Silver Hill scheme progress in timely fashion	Project Team
14	Failure to deliver any affordable housing from Silver Hill regeneration creates lost opportunity to meet housing need	Highly likely	Moderate	Ensure Silver Hill scheme progress in timely fashion	Project Team
15	Calls on capacity and financial resources to restart Silver Hill development process lead to delays in delivery of other major projects	Likely	Major	Consider and plan for resource requirements through Programme Management Group	Corporate Management Team
16	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	Highly Likely	Moderate	Set prudent budget which excludes receipts and ensure adequate reserves	Chief Finance Officer
17	Failure to provide timescale for new facilities impacts on Stagecoach decisions regarding existing bus station with possible negative effects on bus services	Highly Likely	Moderate	Maintain active communication with Stagecoach.	Project Team
18	Serious problem created in providing commercially acceptable solution to relocation of St Clements surgery possibly impacting on viability of health service delivery in the town centre.	Highly Likely	Moderate	Undertake options appraisal and consider revisions to capital programme.	Project Team
19	Additional costs at public expense for public realm improvements e.g. Broadway if no S106 contributions from development	Highly Likely	Moderate	Consider revisions to capital strategy and programme	Assistant Director Major Projects
20	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	Likely	Moderate	Ensure Silver Hill scheme progress in timely fashion	Project Team
21	Lack of city centre car parking capacity at ultra peak times due to failure to replace Friarsgate car park	Likely	Moderate	Ensure a scheme progresses as quickly as possible including replacement car park	Project Team/Cabinet



<b>Risk Ref:</b> CR5002	<b>Risk Score 2015:</b>	Likelihood= Likely Impact = Significant	<b>Previous Score:</b>	Likelihood = Highly Likely Impact = Significant	<b>Risk Owner:</b> Corporate Director	
<b>Risk Title: Silver Hill</b>						
Risk No.	Description of risk	Likelihood	Impact	How will the risk be managed?		Assigned to
	creates negative perception of Winchester as shopping destination.					