

CABINET

13 July 2015

THE OVERVIEW AND SCRUTINY COMMITTEE

13 July 2015

SILVER HILL - SUBMISSIONS BY SILVERHILL WINCHESTER NO 1 LTD AND
COUNCIL'S RESPONSE

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

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

Members may also wish to refer to the minutes of the meetings of Cabinet and The Overview and Scrutiny Committee which considered report CAB2695, on 21 May 2015, where a number of issues were raised by Members:-

<http://www.winchester.gov.uk/assets/files/23766/150521LessEx.pdf>

<http://www.winchester.gov.uk/assets/files/23769/150521LessEx-special-meeting.pdf>

CL110 - Silver Hill: Development Agreement with Silverhill Winchester No.1 Ltd, 18 June 2015

EXECUTIVE SUMMARY:

The purpose of the report is to set out details of the information which has been submitted by Silverhill Winchester No.1 Ltd. under the terms of the Silver Hill

Development Agreement, in order for the Agreement to become unconditional. The report introduces the background information and external advice which is necessary for the Council to consider its response to the submissions and to consider what other action the Council may wish to take in the light of current circumstances.

As set out in CAB2695, the decisions to be taken in respect of the submission are decisions for Cabinet, but as it has done in the past, Cabinet agreed to consult full Council before taking the decisions. This report is therefore being considered at a series of separate meetings (involving Cabinet and The Overview and Scrutiny Committee on 13 July, and full Council on 15 July, followed by a special Cabinet). The final Cabinet meeting would therefore take the final decision in respect of the three submissions.

RECOMMENDATIONS:

To Cabinet

- 1 That having considered the information submitted by Silverhill Winchester No. 1 Limited (SW1), the contents of this report and the advice from external consultants in respect thereof, and subject to Recommendations 2 and 3 below, Cabinet determines:-
 - (i) (in connection with the Social Housing Condition) whether to approve the identity of the housing association and heads of terms for the provision of affordable housing;
 - (ii) (in connection with the Funding Condition) whether to approve the identity of the Fund and the heads of terms for the provision of finance for the development;
 - (iii) (in connection with the Financial Viability Condition) whether the Development is financially viable;as defined and set out in the Silver Hill Development Agreement, as amended.
- 2 That consideration of the submissions on the Financial Viability Condition, and the Social Housing and Funding Conditions, be undertaken by Full Council on 15 July 2015 so it has the opportunity to make any comments to Cabinet, before a final decision is taken by Cabinet on how to proceed;
- 3 That final decisions and approvals in respect of the Financial Viability, Social Housing and Viability Conditions be taken at a meeting of Cabinet immediately following full Council on 15 July 2015, to allow full Council to have an opportunity to make any comments to Cabinet on the matter.
- 4 That Cabinet consider the position in respect of the Works Commencement Date, in the light of the information set out in the report and external legal advice received.

- 5 That subject to Cabinet approving the matters above, in respect of the Winchester City Council (Silver Hill) Compulsory Purchase Order 2011 (the Order):-
- (i) the Head of Legal and Democratic Services be authorised to execute General Vesting Declarations or, at his discretion, to serve Notices to Treat and where necessary Notices of Entry under Sections 5 and 11 of the Compulsory Purchase Act 1965 in respect of land included in that Order;
 - (ii) the Head of Estates be authorised to negotiate and agree terms with interested parties for the purchase by agreement or payment of compensation for any of the interests or rights included in the Order and where appropriate to agree relocations;
 - (iii) the Head of Estates be authorised to take all necessary steps in relation to compensation issues which are referred to the Upper Tribunal (Lands Chamber), including advising on the appropriate uses and compensation payable and in issuing any appropriate certificate and be further authorised to appoint chartered surveyors jointly with Silver Hill Winchester No. 1 Limited to assist and advise in this regard.
- 6 That the decision of Cabinet of 21 May 2015 (CAB2695 refers) to appropriate for planning purposes within the meaning of Part IX of the Town and Country Planning Act 1990 such land as is within the Council's ownership within the area shown coloured pink on the plan at Appendix 2 to that report be re-affirmed.
- 7 That subject to the Cabinet approving the matters set out above, the Chief Executive be authorised to determine and confirm (if required) on behalf of the Council (following the entering into of any necessary agreements by SW1) that the Social Housing Condition, the Funding Condition, and the Financial Viability Condition have been satisfied, as set out in paragraph 7.1 of the report.

To The Overview and Scrutiny Committee

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

TO COUNCIL

- 9 That Council considers the report and determines whether it wishes to raise any matters with Cabinet before final decisions on the submissions are taken.

CABINET13 July 2015THE OVERVIEW AND SCRUTINY COMMITTEE13 July 2015SILVER HILL SUBMISSIONS BY SILVERHILL WINCHESTER NO 1 LTD. AND COUNCIL'S RESPONSEREPORT OF SILVER HILL PROJECT TEAMDETAIL:1 Introduction

- 1.1 This report explains to Cabinet and The Overview and Scrutiny Committee the nature of the submissions made by SW1 pursuant to the Development Agreement between the Council and SW1 dated 22 December 2004 (as varied in 2009, 2010, and January 2014), and referred to in this report as "the Development Agreement". The submissions are in respect of various conditions in the Development Agreement and the work that has been commissioned from external advisors in respect of each of those submissions is explained.
- 1.2 If the conditions in the Development Agreement are satisfied, it will become "Unconditional" and the development will then be able to proceed. Funded by the SW1 and its Fund, the Council will acquire the outstanding interests in the site, grant leases to SW1 or the Fund, and SW1 will then build out and let the development.
- 1.3 Having had regard to the submissions made by SW1 and the advice which is available to Cabinet as to the content and significance of those submissions, Cabinet is asked to consider whether it is satisfied that the redevelopment proposals should proceed in accordance with the terms of the Development Agreement.
- 1.4 At its meeting on 18 June 2015 the Council resolved as follows:-

That Council considers that at the present time, it is not in the best interests of Winchester for a notice of termination to be issued under the terms of the Development Agreement between the Council and Silverhill Winchester No. 1 Ltd dated 22 December 2004 as all the necessary information for a fully informed decision is not available for consideration at this meeting and that Cabinet be advised accordingly.

- 1.5 At that meeting, three letters from Dentons Solicitors, and a legal opinion from David Elvin QC, were circulated to Members. Copies of these documents are appended to this report as Appendices 1, 2, 3 and 4. The report takes account of the matters raised in the letters, and the advice contained in the legal opinion.
- 1.6 The practical effect of a decision to terminate the Development Agreement is considered in the report, as the consequences would be of considerable significance both to the future regeneration of the Silver Hill area and to the Council's financial position.
- 1.7 In making all and any decisions Members are asked to ensure that they take full account of:
- a) the Council's obligations under the Development Agreement;
 - b) the Council's duty to ensure best value in its decision making
 - c) the requirement on any public body to behave reasonably in respect of its responsibilities and duties and with due regard to all the advice it receives;
 - d) the risks attached to any particular course of action and the proper process of risk management (as set out in Section 17 and the Risk Management Table in Appendix 7;
 - e) all of the options which are available to the Council.

2 Background

- 2.1 The Council completed its Development Agreement with SW1 (then known as Thornfield Properties (Winchester) Limited) and its then owners, Thornfield Properties plc, on 22 December 2004. Following a chain of events which have been described fully in previous reports, the shares of SW1 were acquired in 2010 by the Henderson UK Property Fund. This has allowed SW1 to subsequently progress the Silver Hill regeneration scheme further. Members will be aware that the legal entity with which the Council is contracted is SW1 and that its change of shareholders over time has made no difference to the contractual obligations of the parties.
- 2.2 The Development Agreement was varied in 2009, 2010 and January 2014. These variations cannot now be challenged, and the report has been written on the basis of the varied Development Agreement.
- 2.3 SW1 had previously secured the Council's formal approval under the terms of the Development Agreement for the content and design of a regeneration scheme for the Silver Hill area, which was then granted planning consent in 2009. This is now referred to as 'the 2009 scheme' and in summary contains the following principal elements:

- a) a replacement for the existing bus station
 - b) 95,000 square feet of replacement retail space
 - c) 287 new homes, of which 100 will be affordable
 - d) a replacement for the Friarsgate car park
 - e) improvements to the public realm, including the Broadway, and a new public square.
 - f) various planning-related financial contributions
- 2.4 The Council owns the freehold of various separate parcels of land within the redevelopment area, but other sites are owned by third parties. In 2013, following a public inquiry in 2012, the Secretary of State confirmed the Winchester (Silver Hill) Compulsory Purchase Order 2011 (the CPO), allowing the Council to acquire all of the third party land which would be required to ensure that the 2009 scheme could be implemented. The Inspector recommended to the Secretary of State that the CPO be confirmed, and the Secretary of State confirmed the Order in March 2013. A legal challenge to that decision was brought by the London and Henley group of companies, but that challenge was subsequently settled and the proceedings withdrawn. The CPO therefore remains valid and lawful. Section 11 of this report deals with the status of the CPO and includes legal advice on this.
- 2.5 Following discussions with the Council regarding design improvements which were in part necessitated by the position of Stagecoach PLC and in the light of concerns from SW1 that the 2009 scheme would not satisfy funding requirements, changes to the scheme were formally proposed by SW1. These amendments were considered by the Council in its capacity as landowner in July/August 2014, and the amendments were agreed by Cabinet ('the 2014 scheme').
- 2.6 The Planning Committee subsequently resolved to grant planning permission for the revised scheme in December 2014, subject to a Section 106 agreement, although the planning permission cannot be issued until the Secretary of State lifts a holding direction which was made in February 2015.
- 2.7 However, due to legal action by Cllr Kim Gottlieb (which is still the subject of an appeal by SW1), the decision of the Council to approve the amendments to the scheme and to the Development Agreement was quashed, and therefore (subject to the outcome of the current appeal) it is not possible to implement the changes which would be necessary to enable the 2014 scheme to proceed.
- 2.8 Having been prevented from making the changes that the Council had previously agreed, SW1 has reverted to promoting the 2009 scheme which has been previously approved by the Council, in accordance with the requirements of the Development Agreement.

3 Submissions by SW1 under Development Agreement

3.1 The Development Agreement is a contract between SW1 (the Developer) and the Council which sets out the agreed process of bringing a regeneration scheme for the Silver Hill area to fruition. Under the Development Agreement, the Council must consider submissions from SW1 in respect of three outstanding Conditions which the Developer must fulfil before the Development Agreement becomes “unconditional”, at which point the Development Agreement moves into the next phase, i.e. acquisition of the outstanding land interests, and construction of the development. The three conditions are:-

- the Social Housing Condition;
- the Funding Condition;
- the Financial Viability Condition.

The Council is obliged under the Development Agreement to consider the submissions in respect of the outstanding Conditions which have been made by SW1, and give a formal response to them. External advice is being obtained in relation to all three conditions, and this has not been received at the time of writing this report. Members will have the completed advice by the time of the meeting and this advice, together with the information contained in this report, will provide relevant information to Members to conclude the Council's response to the submissions.

3.2 SW1 has made submissions setting out details of:-

- a) The proposed Registered Provider and the Heads of Terms for the sale of the affordable housing to that Registered Provider (The Social Housing Condition, Section 4 of the Report);
- b) The proposed Fund and the Heads of Terms for the agreement with that Fund (The Funding Condition, Section 5 of the Report);
- c) The viability of the scheme, showing how the anticipated profit on the scheme meets the Financial Viability Condition (10% threshold) (The Financial Viability Condition, Section 6 of the Report).

It asserts that these demonstrate that it can meet the requirements of the Development Agreement and that the Council should be satisfied by them.

3.3 Details of the identities of the proposed Registered Provider and Fund, and the Heads of Terms for the agreements with SW1, are commercially confidential, and are included in Exempt Appendices 9 and 10. A summary of the Financial Appraisal is attached as Exempt Appendix 11. **Members are reminded that these details, and the other Exempt Appendices (including the reports from the external advisors), should not in any circumstances be disclosed to or discussed with any other person (other than Officers or Members). To disclose such information outside**

the Council would be a breach of the terms of the Development Agreement.

- 3.4 An open Appendix 8 (to follow) will set out in outline the submissions made and the assessment of these, but Members will need to refer to the corresponding Exempt Appendices in order to reach their decisions.
- 3.5 The Council has until 16 July 2015 to give a substantive response to the submissions on the three conditions which have been made by SW1. SW1 can refer the matter to an independent person for determination if the Council does not respond, and either party can refer a dispute over the submissions to the independent person.
- 3.6 As set out in Section 10, the Development Agreement does permit the Council to serve three months' notice of termination on SW1, to end the Development Agreement. However, the obligations on the Council (which are set out in the Development Agreement) to consider and make decisions on submissions made by SW1 continue during this notice period, and therefore the Council should reach a conclusion on the submissions made by SW1 in any event. Moreover, as set out in Section 10, if the notice of termination relates to the outstanding Conditions, SW1 have 20 working days to seek to discharge the Conditions, and if they succeed in doing so in that period, termination will not occur.
- 3.7 Accordingly, Members should consider the submissions which have been made, in the light of the advice in the report, its appendices, and from external consultants, and reach decisions on them in any event.

4 Social Housing Condition

- 4.1 The full Social Housing Condition is as follows:-

“the Developer having entered into a legally binding agreement with a RSL for the sale of the Affordable Housing and to let and manage the Social Rented Housing on terms approved by the Council (whose approval shall not be unreasonably withheld or delayed) which agreement has become unconditional save for any condition which relates to this Development Agreement becoming Unconditional”

- 4.2 This therefore requires:-
- a) the Council's approval to the identity of a housing association (registered provider) which will provide the affordable housing in the development; and
 - b) the Council's approval to a legal agreement between SW1 and the registered provider, which covers the sale to the registered provider of the affordable housing required under the scheme, and its future letting and management, on terms agreed by the Council.

- 4.3 SW1 has proposed the Registered Provider identified in Exempt Appendix 9, and the Heads of Terms of the proposed agreement with that Registered Provider are also included in Exempt Appendix 9.
- 4.4 Although the detail of the submission can only be reported in Exempt Session it can be stated that the Registered Provider is well known to the Council and considered to be suitable to act in the capacity suggested.
- 4.5 The Development Agreement does include provisions allowing the Council (prior to the legal agreement between SW1 and the Registered Provider being entered into) to require SW1 to alter the affordable housing mix which is set out in the Development Agreement. This is subject to financial constraints, and because of these, it is unlikely that the Council would be able to require an alteration of the affordable housing mix.
- 4.6 As well as its assessment of the Fund, Deloitte are also reviewing the financial strength of the Registered Provider, and details of their assessment will be included in Exempt Appendix 14.
- 4.7 This condition was not fulfilled as at 1 June 2015 because at that date, no legal agreement had been entered into with the proposed Registered Provider. Clearly, however, if the Council approves the identity of the proposed Registered Provider, and the heads of terms for the agreement with it, in accordance with the submissions which have been made, the conditions could be fulfilled by SW1 and the Registered Provider signing the agreement within a short period of time after approval has been given.

5 Funding Condition

- 5.1 The full wording of the Funding Condition is:-

“the Developer having entered into a legally binding agreement which has become unconditional save for any condition which relates to this Development Agreement becoming unconditional with a Fund to finance the acquisition of the Site and/or finance the Development and which provides adequate security for the Developer’s obligations under this Agreement and under the Full Indemnity Agreement and contains a direct covenant from the Fund to the Council (unless the Developer is unable to obtain such a direct covenant having used reasonable endeavours (having regard to market practice at the relevant time) to obtain one) such security and any such covenant to be approved by the Council (whose approval shall not be unreasonably withheld or delayed).”

- 5.2 This therefore requires:-

- a) the Council’s approval to the identity of a Fund which will provide the funding for the development;
- b) the Council’s approval to a legal agreement between SW1 and the Fund. The Funding agreement must provide for the funding of the

acquisition of the site and the construction of the development, and include:-

- (i) adequate security (approved by the Council) for SW1's obligations under the Agreement and the Full Indemnity Agreement (an agreement between the Council and SW1 whereby SW1 indemnifies the Council against the cost of the CPO and its implementation); and
- (ii) a direct covenant from the Fund to the Council (unless SW1 is unable to do so, having used reasonable endeavours (having regard to market practice)).

- 5.3 SW1 has proposed the Fund identified in Exempt Appendix 10, and the Heads of Terms of the proposed agreement with that Fund are also included in Exempt Appendix 10.
- 5.4 As per the Social Housing Condition, this condition was not fulfilled as at 1 June 2015 because at that date, no legal agreement had been entered into with the proposed Fund. Clearly, however, if the Council approves the identity of the proposed Fund, and the heads of terms for the agreement with it, in accordance with the submissions which have been made, the conditions could be fulfilled by SW1 and the Fund signing the agreement within a short period of time after approval has been given.
- 5.5 Deloitte LLP (Corporate Finance team) have been commissioned to report on the proposed Fund, and the funding Heads of Terms submitted by SW1 in relation to this condition. Their report will be provided separately to Members (Exempt Appendix 14, to follow). Essentially, Members will need to consider, in the light of the report, if the Fund proposed provides adequate security to meet the Developer's obligations within an acceptable level of risk to the Council.
- 5.6 The work being performed is a review of publicly available financial information looking at; recent financial performance; the current financial position; the business model, and other relevant research on the financial covenant such as defaults on other financial commitments and recent developments in their business. The protection mechanisms that should be in place between the counterparties will also be considered.

6 Financial Viability Condition

- 6.1 The full wording of the Financial Viability Condition is:-

"the Developer having demonstrated to the reasonable satisfaction of the Council immediately before the date when the last of the other outstanding Conditions is satisfied or (where provided under Schedule 2) waived that the Development is financially viable meaning that the anticipated profit is not less than 10% of anticipated Development Costs; and taking into account payment of the minimum rent under the Lease."

- 6.2 This requires that Council consider the information supplied by SW1, and decides whether the developer's anticipated profit on the anticipated costs of the development will be at least 10%. This decision must be confirmed immediately before the point at which the Development Agreement becomes unconditional (i.e. when all the other conditions have been fulfilled).
- 6.3 Members will recall that at its meeting of 1 April 2015, full Council called upon the Leader and Cabinet to seek at least two external opinions on any viability calculations submitted on any Silver Hill scheme, and this was accepted by Cabinet at its meeting of 15 April 2015.
- 6.4 Prior to 1 June 2015, SW1 submitted a statement which, according to SW1, demonstrates that this will be the case. The Council subsequently (3 June 2015) received the supporting information for this statement and has commissioned two separate major property consultancies (Deloitte LLP, and Knight Frank LLP) to test the financial viability of the development, based on this supporting information. In the course of their work, the Council's advisors did require additional information in order to carry out their appraisal, and a revised appraisal was subsequently submitted by SW1; and as a result the time period for the Council to make its decision was extended in accordance with the provisions of the Development Agreement.
- 6.5 Members have expressed concern about how the viability of the scheme has changed. Deloitte, who have advised the Council throughout, have been asked to deal with this specific issue in their report.
- 6.6 The external advice is due to be received on 8 July 2015 and is therefore not available to inform the writing of this report. It will be made available to Members as soon as the consultants' reports are submitted to the Council. A full briefing for all Members from the external advisors has been organised and will have taken place by the time of the meetings of Cabinet and The Overview and Scrutiny Committee. This will provide an additional opportunity for Members to ask detailed questions and to receive full answers from the advisors.
- 6.7 Members should note that the financial viability appraisal is only a prediction of the costs and returns of the development, based on assumptions which should be as reasonable and as accurate as possible (and the reports of the Council's external advisors will assess these assumptions as part of their work). Members will need to take account of the external advice on the appraisal and the assumptions within it. The Council should satisfy itself that the assumptions and figures in the financial viability appraisal are appropriate and reasonable, and should not reject it solely on the basis that the final figures may be different from this current assessment.
- 6.8 Exempt Appendix 11 includes a summary of the detailed viability appraisal submitted by SW1. The detailed viability appraisal, and supporting information supplied with it, are being assessed by the two consultants engaged by the Council to report on the Financial Viability Condition.

7 Possible Outcomes on Condition Submissions

All Submissions Approved – Agreement becomes Unconditional

- 7.1 If Members approve the submissions in respect of the three conditions, and the relevant agreements with the Registered Provider and Fund are then entered into by SW1, the Development Agreement will become unconditional, and the development can then proceed in accordance with the provisions of the Development Agreement. SW1 would then be committed to developing the scheme in accordance with the 2009 approved proposals, and the Council would have to acquire the outstanding interests and grant leases to SW1, in accordance with the terms of the Development Agreement. Recommendation 7 proposes delegated authority being given to the Chief Executive to determine and confirm (if required) when the conditions have been satisfied (e.g. that the agreements are in accordance with the approved heads of terms, etc.), in order to provide certainty for this part of the process.

One or More Submissions Not Approved – No Notice of Termination Served

- 7.2 If Members are not satisfied with one or more of the submissions, the Council would confirm this to SW1 as its substantive response. The Council could, if it so wished, indicate what changes would be required to the submission to make it acceptable, giving SW1 an opportunity to rectify the submission. It should be stressed that only the subject-matter of the submissions can be considered, and it is not possible as part of this process for the Council to seek changes to the scheme itself. Alternatively, it could leave SW1 to consider how to respond, which might include an alternative submission, or a reference of the matter to the independent person as provided for in the Development Agreement. If the Development Agreement was not terminated, and either the original submission was deemed acceptable by the independent person, or a satisfactory submission is subsequently made to, and approved by, the Council, the Development Agreement would then go unconditional when any further agreements required in connection with that submission had been entered into.

One or More Submissions Not Approved – Notice of Termination Is Served

- 7.3 In this case, as well as confirming its substantive response, the Council could also serve notice to terminate the Development Agreement. However, this would not necessarily mean that the Development Agreement would terminate. SW1 would have 20 working days to seek to resolve the issue(s) which the Council was concerned about. If the relevant Condition(s) are discharged within that 20 working day period, the Development Agreement will not terminate and the development will be built out, as set out in 7.1 above.

In addition, a decision to serve a notice of termination may have significant adverse consequences for the Council, as set out below.

8 Works Commencement Date

- 8.1 The Council may also serve notice to terminate the Development Agreement if the “Works Commencement Date” (as defined in the Development Agreement) had not occurred by 1 June 2015. The Agreement defines the Works Commencement Date as being the date when the development is begun by the carrying out of a Material Operation. This requires at least some works of a specific nature to have been carried out by 1 June 2015. The Development Agreement specifies that the works needed to meet this requirement are the same as those which would meet the requirements of the Town and Country Planning Act 1990 for the purposes of making a material start on a site to implement a planning consent (as set out in Section 56 of the Town and Country Planning Act 1990). However, the Development Agreement does not expressly require that the planning consent is implemented – only that works of the qualifying nature are undertaken.
- 8.2 A site visit on 1 June 2015 noted that some works to install what appeared to be a drain and manhole covers had already been undertaken (i.e. prior to 1 June). At the time of the visit, the contractor was removing the fencing around the site. SW1 have formally asserted that in its opinion the Works Commencement Date had occurred before 1 June. Subsequently, SW1 have supplied a construction drawing showing the works which had been carried out, and stated that the works were started on 28 May 2015. A further site visit on 30 June has confirmed that the works shown on that drawing (the installation of a manhole chamber, together with a pipe leading to an existing petrol interceptor, have been carried out, and the evidence from the second site visit would suggest that these works were in place before 1 June (the date of the first site visit).
- 8.3 From the information provided by the developer, and the on-site evidence, it would therefore appear that some works had been undertaken by the relevant date. Section 56 of 1990 Act defines a “material operation” (which is the test to decide whether or not the Works Commencement Date has occurred) as meaning (as far as is relevant for the works that have been undertaken):-
- (a) any work of construction in the course of the erection of a building;
 - (b) the digging of a trench which is to contain the foundations, or part of the foundations, of a building;
 - (c) the laying of any underground main or pipe to the foundations, or part of the foundations, of a building or to any such trench as is mentioned in paragraph (b);
- 8.4 Officers are seeking external legal advice to confirm whether or not the works undertaken do constitute a “material operation”, so that the date when they were carried out would be the Works Commencement Date. This advice will include confirmation as to whether the Development Agreement effectively

requires a lawful implementation of the planning permission, rather than merely the carrying out of works which fit within the statutory definition.

- 8.5 The external advice will also cover the risk to the Council should it seek to terminate the Development Agreement on the grounds that the Works Commencement Date had not been achieved by 1 June 2015, in terms of a claim from SW1 that the Development Agreement was terminated in breach of contract.
- 8.6 Once received, the advice will be circulated to Members as Exempt Appendix 16 (to follow).

9 Decision-Making Considerations

- 9.1 The Council must comply with its obligations under the Development Agreement and assess the submissions that have been made by SW1, taking into account the advice that has been obtained in respect of these submissions.
- 9.2 In considering the recommendations in this report, Members should consider the practical effect of their decisions for the regeneration of Silver Hill because that is the reason the Development Agreement exists in the first place.
- 9.3 Members will wish to have regard in their decision-making to two primary considerations:
- a) What are the Council's obligations under the Development Agreement and what are the risks associated with taking any particular course of action which appears to be open to it under the terms of the Agreement;
 - b) What are the risks and benefits to the community and to the economy of proceeding or not proceeding with a consented scheme for the regeneration of an area of the town centre which is in poor condition or embarking upon alternative schemes for regeneration.
- 9.4 Previous reports have set out the nature of the regeneration scheme the Council has previously approved. The scheme is set out in CAB2695 21 May 2015 and CL110 18 June 2015, and report PDC768 (which considered the planning application for the scheme). In addition, Members have had the opportunity to view an exhibition of the scheme.
- 9.5 Members are familiar with the arguments made for and against this scheme. However, Members should bear in mind that the scheme before them delivers all those elements which the Council required the developer to deliver and has the benefit of planning consent. Members are reminded that the advice from Officers and professional advisors is that there is no alternative scheme and that statements which imply that credible alternatives could be brought forward and lead to regeneration commencing 'on the ground' in a matter of months have no reasonable basis.

- 9.6 Appendix 6 is a timeline prepared by the Council's retained legal advisors, BLP LLP, which sets out the various steps and likely timescales that would need to be allowed in order to bring forward an alternative scheme, in the event that the existing Development Agreement with SW1 was to be terminated. This suggests a delay of five to six years before a start on site could be made if a new scheme was to be pursued.
- 10 Termination Provisions
- 10.1 The Development Agreement contains various termination provisions. Clause 24.1.1 includes a mutual termination provision allowing either party to serve three months' notice to terminate the agreement, if before a certain date either the agreement had not gone "unconditional" or the Works Commencement Date had not occurred by 1 June 2015.
- 10.2 There is no obligation on either party to terminate, and until termination actually occurs (i.e. on the expiration of the three months' notice) both parties remain bound by the Development Agreement and their obligations under it.
- 10.3 Section 8 above sets out the position in respect of possible termination if it can be shown that the Works Commencement Date had not occurred before 1 June 2015.
- 10.4 In terms of termination on the basis that the Development Agreement had not gone Unconditional by 1 June 2015, it is understood from correspondence with SW1 that no formal agreements with the Fund or the Register Provider have yet been entered into. This was because SW1 has elected not to enter into the agreements with the Registered Provider and the Fund until it knows that the Council is satisfied with the Registered Provider, the Fund and the terms for agreements with them, although it is understood that agreements could be entered into shortly after the Council approves the submissions which have been made. The effect of this is that the Agreement was not unconditional as at 1 June 2015, but (at least as far as the Funding and Social Housing Conditions are concerned) it could go unconditional within a short space of time following the Council approving the submissions.
- 10.5 Where notice of termination is served on the basis of the Agreement not having gone unconditional by the due date, the Development Agreement further provides that where the conditions are discharged within 20 working days after notice of termination is received, then the Development Agreement will not terminate. This is an important proviso in the current situation, in that it is expected that SW1 would be in a position to enter into the necessary agreements with the Fund and the Registered Provider within such a period, satisfying the outstanding conditions, and thereby prevent the termination from occurring.
- 10.6 In order to avoid a notice of termination in these circumstances taking effect, SW1 would need to ensure that the following matters occur:

- a) SW1 would have 20 working days to enter into legal agreements with their proposed Fund and/or their proposed Registered Provider on terms of their choosing – although these would presumably be those that have already been put to the Council. The Council would still be required to verify that the completed agreements complied with the approved entities and the heads of terms..
 - b) That the Financial Viability Condition is met. If the Council has agreed (taking into account the advice of the two retained consultants) that the Financial Viability has been met, this would need to be verified immediately before the last outstanding condition was satisfied. If however the Council had concluded that the Financial Viability Condition had not been met, SW1 would have to either pursue the dispute resolution process set out in the Development Agreement, or amend the Appraisal so as to make the scheme viable for the purposes of the Agreement.
- 10.7 If the Council's advisors had concluded that the Financial Viability condition had been satisfied, but the Council disagreed, then the Council would have to consider whether it could maintain the position that it is not 'reasonably satisfied' regarding the viability in the light of the evidence before it. The advice of Officers and external solicitors is that the Council would be at high risk of successful litigation by SW1 if Members declined to accept two reports that they had themselves commissioned without exceptional reasons based purely on financial considerations.
- 10.8 Members should therefore be aware that a decision to give notice to terminate the Development Agreement, on grounds that the three conditions which SW1 must satisfy were not satisfied in time, would not necessarily be the conclusion of the matter, as the Developer may well be able to satisfy them within the 20 working day period it has.
- 10.9 In this period, the Council will remain subject to the specific provisions of the Development Agreement to make decisions and to do so cooperatively and purposefully towards the satisfaction of the Agreement. To stand back and refuse to respond to SW1 would be a breach of the Council's obligations.
- 10.10 In any event the Council must give its response to SW1 regarding the submissions made to it in respect of the three conditions.
- 10.11 Dentons Solicitors, acting for Councillor Gottlieb, have written to the Council suggesting that the Council is under both a public law obligation, and a general good practice obligation, to serve notice of termination on the grounds that the conditions in the Development Agreement have not been satisfied (Appendix 2).
- 10.12 In terms of public law, Leading Counsel (David Elvin QC and Nigel Giffin QC, Appendices 4 and 5 respectively) have advised that although the law at the time of the Development Agreement did require a procurement exercise to be carried out, it does not follow that the Development Agreement is now void

and/or unenforceable, nor is it the case that the CPO cannot be used due to such a breach of procurement law. On the basis that the Development Agreement is enforceable, the Council has a duty to comply with those obligations (or face potentially significant damages claims for breach of contract). If the Development Agreement becomes Unconditional, it cannot therefore refuse to exercise CPO powers if called upon to do so by SW1 in accordance with the Development Agreement. Dentons also suggest that the latest Public Contracts Regulations 2015 now include an implied right to terminate contracts where there have been breaches of procurement law. However, as noted by Nigel Giffin QC (but not addressed by Dentons) the new regulations do not apply to existing contracts.

10.13 Dentons then go on to assert that the 2009 scheme is not as good a scheme as it could be, and that a better scheme could be designed, and therefore the existing Agreement should be terminated. This approach ignores the implications that would ensue, in terms of delay and cost, if the existing Agreement is terminated in order to seek to implement a different scheme.

10.14 Finally, Dentons suggest termination would allow the Council to test the market to ensure best consideration is obtained. The advice from the Council's professional consultants is that in the current market, it is unlikely that the Council would be able to achieve better terms for a scheme which is in accordance with the requirements of the Development Agreement.

11 Other Legal Considerations

11.1 There are other matters which Members should consider within the decision making process, in particular those raised by solicitors acting for Cllr Gottlieb.

Status of the Development Agreement

11.2 It has been suggested by objectors to the scheme that Development Agreement is not a binding document because the procurement process following which it was entered into was unlawful.

11.3 Advice received from Leading Counsel (Nigel Giffin QC, Appendix 5) is that this is incorrect. Although the procurement process itself was unlawful (albeit this was only known some years after the entering into of the Development Agreement) this does not render the contract void. Case law is clear that the contract is enforceable by both parties. Mrs. Justice Lang herself acknowledged in her judgement on the Judicial Review in January 2015 that it is now too late to challenge the lawfulness of the Development Agreement on this point, as did the solicitors acting for Cllr Gottlieb (Dentons) in their letter of 18 June 2015 (Appendix 3).

11.4 Only if the Council had entered into the Development Agreement without the power to do so could the Development Agreement be considered unenforceable. However, Leading Counsel has advised that the Council did have the power to do so and retains the requirement to fulfil its obligations (Nigel Giffin QC, Appendix 5).

Status of the Compulsory Purchase Order

- 11.5 It has been suggested by Cllr Gottlieb's solicitors that the CPOs are not valid, either because of the unlawful procurement process for the 2009 scheme, or because the evidence that the 2009 scheme was viable given at the CPO inquiry was not correct (letter from Dentons 20 May 2015, Appendix 1). If that is not accepted, they have suggested that the Council is in some way barred on the principle of 'good conscience' from exercising the CPO because it was obtained 'under false pretences'. For similar reasons, they assert that the Council cannot comply with the Land Appropriation Condition and appropriate land in its ownership to support an unlawfully procured Development Agreement.
- 11.6 Exempt Appendix 3 of CAB2695 gave legal advice on various issues, including the effect of the judgment in the Judicial Review challenge brought by Cllr Gottlieb on the Development Agreement. This advice was expanded by Nigel Giffin QC's advice (Appendix 5).
- 11.7 The CPO inquiry received detailed submissions from objectors on the procurement issue, and both the Inspector and the Secretary of State were fully advised on the procurement position. They and their legal advisors did not consider that this prevented the confirmation of the CPO. As noted in paragraph 2.3 above, a challenge to that decision was withdrawn, and the decision cannot now be challenged due to legal time limits. The CPO is confirmed and there would appear to be no reason why it cannot be lawfully and properly used (but see risk management issues in respect of potential challenge).
- 11.8 The evidence given to the CPO inquiry was all in respect of the 2009 scheme, in an identical form to that which it is now proposed to be implemented and for which the CPO is to be used. Many development schemes go through review and reconsideration between the grant of a CPO and its implementation. It is difficult to follow a line of reasoning that due to an interim reconsideration (i.e. the 2014 scheme), the implementation of the original scheme (using a CPO that the Inspector and the Secretary of State considered and confirmed) should be disallowed by a court.
- 11.9 What is before Members now is consideration of whether to use the CPO to achieve delivery of the 2009 scheme which is exactly the same scheme as was before the Inspector and the Secretary of State when they recommended approving and then confirmed the CPO. The Inspector and the Secretary of State could have turned down the CPO on the grounds of the procurement issue but they did not, and they were not challenged on that decision.
- 11.10 Advice from Leading Counsel (David Elvin QC), and Richard Moules (Appendix 5) concludes that the Council can lawfully use the confirmed CPO to support development of the 2009 scheme under the Development Agreement.

Obtaining Best Value or Best Consideration

- 11.11 There are two matters for the Council to consider in relation to the property interests that it is contributing to the scheme under the terms on the Development Agreement. They are generally referred to as 'best value' and 'best consideration' and frequently confused, although they are different concepts with distinct meanings and are not interchangeable terms.
- 11.12 In general terms, the Council as a 'best value authority' has a duty under the Local Government Act 1999 (as amended) "*to make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness*". It is important to note that 'best value' is not defined in solely financial terms. Best value is a judgement for the Council to make and in doing so it may take into account anything which it properly considers to be relevant. The best value duty does not prevent a Council from, for instance, making land available free of charge for affordable housing, leasing a community building to a social enterprise for a sub-market rent, or disposing of land as part of a regeneration scheme in order to secure regeneration of the area. The 'best value' duty is for the Council to make a rounded judgement in the interests of the operation of the Council and well-being of the community it serves.
- 11.13 As a separate matter, in a regeneration scheme such as this, under Section 233 of the Town and Country Planning Act 1990, the Council must obtain the best terms it can for the property that it is contributing to the agreed scheme, *in the context of that scheme*. This is a different requirement to the situation under Section 123 of the Local Government Act 1972, which applies to other land transactions, where the Council must obtain the best consideration that could be obtained (without any restriction or requirement on the purchaser being imposed).
- 11.14 Section 233 of the Town and Country Planning Act 1990 allows the Council to dispose of land for the promotion of what it considers to be the best planning of an area. The consideration the Council obtains for its land may be less than could otherwise be obtained for a more commercially advantageous exploitation of the land. This is because regeneration schemes planned by local authorities on their own land frequently incorporate elements which are considered to be in the public interest but which reduce the financial return.
- 11.15 Objectors have called into question the financial advice from the Council's advisors because they are only asked to evaluate a particular scheme rather than any possible options. That criticism is based on a misrepresentation of why the advice is sought. It is not obtained to verify that there is no possible scenario (however fanciful) in which a better return could be obtained – although that may nevertheless be true. It is obtained to test whether the terms being offered for this particular scheme – the one on which the Development Agreement is based, which the Council has already agreed it supports and which may be on the verge of being delivered – are the best that could be obtained at the moment they crystallise. All the advice the Council has received to date has confirmed that it is and the current advice remains

that in the current market, the Council is not likely to be able to achieve better terms.

12 Use of Compulsory Purchase Powers

- 12.1 Dentons Solicitors have suggested that the Council should not exercise the CPO powers, relying on the judgement in the judicial review case. Legal advice from Leading Counsel has confirmed that provided Members properly consider the relevant issues, the Council can use the powers in the CPO to acquire the outstanding interests in the Silver Hill development site, to allow the scheme to proceed. The recommendations include a recommendation to authorise the Head of Legal and Democratic Services to exercise these powers and acquire the outstanding land interests. This section sets out the considerations that Members should take into account in deciding whether to accept that recommendation.
- 12.2 The case for regeneration is set out in Section 2 of Report CL110 (18 June 2015). The regeneration of this site has been under discussion for nearly twenty years. During that period, the public assets in the site (e.g. the Bus Station and the Car Park) have significantly deteriorated, and there is a clear and urgent need for these assets to be replaced. Similarly, modern health care facilities are required to replace the existing provision within the site.
- 12.3 Other buildings in the area, such as Coitbury House and Friarsgate Medical Centre, are now empty and will need to be replaced in order that best use is made of this land.
- 12.4 The existing retail facilities are now more than forty years old, and their condition is detrimental to the character and amenity of the area. Modern retail facilities are required to complement existing town centre retail, and mitigate against the threat of out-of-town retail which would have an adverse effect on the town centre.
- 12.5 Residential development, with affordable housing provided, will contribute to the Council's need for housing, with market, shared ownership, and social rented housing being provided under the 2009 scheme.
- 12.6 The 2009 scheme has planning consent, and (subject to the Council giving the necessary approvals, and exercising CPO powers to acquire the outstanding interests) can now proceed. The 2009 scheme will address all of the issues set out above, providing a modern, but appropriate, development in this key part of the town centre.
- 12.7 It is now clear that the Council should have undertaken a procurement process when it selected a development partner in 2004. At the time, however, having acted on advice, it took the view that negotiating an agreement with a single developer was permissible. Legal advice has been received which confirms that despite that breach, the ensuing Development Agreement, with the various obligations on the part of the Council within it, remains valid and enforceable.

- 12.8 Whilst it may be possible to serve notice of termination on SW1, it is thought highly likely (subject to the advice of consultants to be provided to Members at the meeting) that the Agreement would go unconditional in any event, and the Development Agreement would therefore continue.
- 12.9 If the Development Agreement was terminated, it is highly likely that any replacement redevelopment scheme will take many years, not months, to get to the same position as is now the case with the 2009 scheme. The base planning policy and various other plans would need to be reviewed and drawn up, a new CPO would be required, and a development partner would need to be procured. As well as the delay which this process would entail, it would be more difficult, and more expensive, for the Council to regain the position it is currently in, with a new developer.
- 12.10 In the circumstances, it is considered that notwithstanding the breach of the Public Works Contracts Regulations 1991, the public interest is best served by the Council dealing with the submissions that have been made to it under the Development Agreement, and (assuming they can be approved) exercising the powers it has under the CPO to acquire the entire site, as well as appropriating the Council's own land within the site for planning purposes, to facilitate the redevelopment of the area by the construction of the 2009 scheme.

13 Appropriation of Land

- 13.1 One of the Conditions under the Development Agreement that is for the Council to meet is the Land Appropriation Condition. This requires the Council to appropriate the land with the site to planning purposes within the meaning of Part IX of the Town and Country Planning Act 1990.
- 13.2 Section 122 of the Local Government Act 1972 allows the Council to appropriate land no longer required for one statutory purpose, to a different statutory purpose. For land already held for planning purposes, Section 232 of the 1990 Act applies, and allows the Council to appropriate the land to other purposes.
- 13.3 Much of the land owned by the Council was acquired for planning or redevelopment purposes. Some of the land is held, or was acquired, for other purposes. Examples include the car park, and land adjacent to 27 Eastgate Street.
- 13.4 It is considered that the same issues as were set out in Section 12 above (in relation to the use of CPO powers) apply equally to the question of appropriating land owned by the Council within the site to planning purposes.

14 Conclusions

- 14.1 It is for Members to determine what action now to take in the light of the information it has and the advice it has received.

- 14.2 If the external advice is that the submissions by SW1 are acceptable, and Members agree with that conclusion, the Council can give a substantive, positive, response to SW1, allowing it to enter into the outstanding agreements. That will then mean the Agreement is Unconditional, and the development will proceed.
- 14.3 Even if the external advice is that the submissions by SW1 are acceptable, and Members agree with that conclusion, it would nevertheless be open to the Council to serve notice of termination, on the basis that the necessary agreements were not in place as at 1 June 2015. However, this course of action is not advised, as SW1 could go ahead and enter into the outstanding agreements. If that is completed within the 20 working day period, termination will not occur and the agreement will then go Unconditional. Moreover, serving notice of termination entails the risk of litigation by SW1 to seek to recover damages. The Council's legal advisors, BLP Solicitors, have advised the Council throughout this process and have reviewed this report. Although there would appear to be no obvious basis on which the Council has acted in breach of its obligations under the Development Agreement or not in good faith, it is not possible to say definitively that the Council will be able to successfully defend any action against it, bearing in mind the many different obligations which the Council has under the Development Agreement.
- 14.4 If, in the light of external advice and this report, Members consider the submissions are not acceptable, the Council will need to give a substantive response to this effect. Notice of termination could be given, but Members should bear in mind that SW1 may still try to meet the conditions. The Council must still cooperate with SW1 during the 20 working days period which they have to seek to discharge the conditions. If SW1 succeed in doing so, the Council's notice would not lead to the termination of the Agreement. The Council must continue to comply with its obligations under the Agreement and respond to any further submissions, unless and until the Agreement is finally Terminated.

OTHER CONSIDERATIONS:

15 COMMUNITY STRATEGY AND PORTFOLIO PLANS (RELEVANCE TO):

- 15.1 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.

16 RESOURCE IMPLICATIONS:

- 16.1 If the Agreement does become unconditional and the development proceeds to completion, the Council's long term financial position will be made more certain. The development will generate at least the minimum rent provided for in the Development Agreement, to replace the previous rent receivable, and there is the possibility of an overage payment if the development profit is sufficient. The property purchased from London and Henley in January 2014

will be purchased by the developer at the price paid by the Council (£5m) which will enable the £5m borrowing to be repaid and release £170k to the Usable Reserves. Amounts due under the Section 106 agreement will also become receivable, including a further £700,000 towards costs incurred on CCTV relocation as well as payments for arts and for transport matters.

- 16.2 In addition the Council, and therefore the local taxpayer, will expect to benefit directly from an increase in business rates collected from new commercial property over and above that which is paid today.
- 16.3 A new car park will be provided which the Council has the right to acquire under the Development Agreement at a favourable return.
- 16.4 If the development does not proceed, the Council will still have the option to pass the former London and Henley Properties back to SW1 and receive £5m in return, although it would be unlikely to do so in order to retain control of this land.
- 16.5 If there is litigation with the Developer after termination of the Agreement, then budget provision will have to be made for the immediate costs of the litigation, of which the Council is likely only to recover approximately two-thirds of its costs even if it is ultimately successful. The Council will also have to give consideration to how it provides for and manages the possibility of substantial damages being awarded against it. This could adversely affect the Council's capital strategy until the matter is settled, even if no damages are payable. Advice from BLP on this aspect is set out in CAB2695, Exempt Appendix 3.
- 16.6 If the Council does terminate the Development Agreement then it would, presumably, wish to pursue alternative development proposals. This would require Council resources of time and money, and significant external fees, which would require budget provision. Although these might be recovered ultimately from comprehensive development, there would be no guarantee of this. Members are referred to the timeline in Appendix 6 in this respect.
- 16.7 The Council may also find itself having to acquire additional property to manage events as it would wish (for instance if property was put on the market which the Council wished to gain control over) which would also require budget provision and which may not have an immediate return. One such property is the St Clements' GP surgery building which would have to be acquired by the Council if the relocation of the doctors from their current unsatisfactory building is to be achieved, in the absence of a comprehensive development in the immediate future.
- 16.8 Members should therefore be aware that moving forward with the scheme has generally positive impacts on the Council's financial position, whilst terminating the Agreement creates more uncertainty and therefore risks for the Council.

17 RISK MANAGEMENT ISSUES

17.1 Appendix 7 sets out a table of possible risks in connection with this report. The table assesses the risks against possible scenarios which may arise:-

- Where the Council accepts the submissions made and agrees the conditions have been met;
- Where the Council considers that the submissions are not acceptable as made, but could be modified to make them acceptable;
- Where the Council considers the submissions are not acceptable and seeks to terminate the Agreement

Submissions Acceptable

17.2 In this scenario, the regeneration is more likely to take place, which mitigates the adverse risks which arise if the Agreement is terminated and the development does not proceed.

17.3 Although there would remain a risk that the development did not proceed, despite having gone unconditional, or did not proceed to completion, there are measures in the Development Agreement which allow the Council to step in and secure the completion of the development.

17.4 Objectors to the scheme may seek to challenge the Council's decisions. Legal advice is being obtained throughout this process to minimise this risk.

Submissions Acceptable if Modified

17.5 If the Council considers the submissions could be made acceptable with modifications, SW1 may be unwilling or unable to change its proposals, and the scheme would not then proceed, with the adverse consequences as for termination.

17.6 Objectors could also bring legal challenges against this decision.

Submissions Unacceptable/Agreement Terminated

17.7 In this scenario, the development would (or might) not go ahead. The key risks would be:-

- a) Delay in the regeneration of the site;
- b) Legal claims against the Council for damages by SW1;
- c) Adverse financial impacts on the Council in respect of its assets within the site and other payments not being made to the Council;
- d) Non-delivery of market and affordable housing;
- e) Lack of car parking;
- f) Deteriorating bus facilities

- 17.8 The 2009 scheme includes a replacement bus station, affordable housing and a replacement for the Friarsgate Car Park, all of which are current issues for the town centre. Going ahead with the 2009 scheme will remove uncertainty over how these will otherwise be dealt with. The amount of retail space in the 2009 is no greater than is currently located in the Silver Hill area, but it is of a type that will attract mainstream retailers who will reinforce Winchester's retail offer and thus the conditions for a diverse range of independent and multiple traders. None of the evidence from statutory objectors to the CPO suggested that the additional retail space would have a detrimental effect on the High Street, nor does any of the advice obtained from Nathaniel Lichfield Partners (the Council's retained retail consultants) in relation to Silver Hill in 2014 (CAB2603 Appendix 2 refers) or the Local Plan suggest this.
- 17.9 If the Council does terminate the Development Agreement, then it will have no means to achieve the comprehensive development of the area required under the Local Plan Part 1. Piecemeal development would not be acceptable without a change in planning policy which would, itself take some time to undertake. In the meantime, the Council would have no means to demonstrate the delivery mechanism for town centre retail space and be vulnerable to undesirable out of town applications being promoted speculatively and successfully.
- 17.10 Land within the Silver Hill area is in multiple ownerships, including that of SW1. These include the City Council, Stagecoach, SW1 itself, Marks and Spencer, King Edwards School, Birmingham, and the private owners of the St Clements surgery. There is no prospect of a 'friendly' meeting of minds to achieve an alternative form of development – such an outcome is simply not credible given the nature of the commercial property market.
- 17.11 Members will be aware that the form and content of the 2009 scheme is a product of the Council's own planning brief, for example in the requirement for a replacement public car park which contributes substantially to the mass of the scheme. To promote alternative development options, the Council will have to review and reconsider all of the issues relating to Silver Hill and will wish to consult upon them. Unless the Council (and the communities it represents) fundamentally changes its position on the provision of replacement bus facilities, a multi storey car park, housing (including affordable housing) and replacing retail facilities (including Sainsbury's which accounts for a substantial proportion of the floorspace) then the development must have similar characteristics. Comprehensive redevelopment will be the only way to secure infrastructure requirements. Even the mechanism once proposed by London and Henley for accumulating piecemeal payments from Section 106 agreements towards a new bus station or Broadway improvements (which the Council considered unacceptable) is no longer open as the Government has made the pooling of more than 5 receipts for a specific project (which would quite probably be required) unlawful. The Council should also be mindful of the issues such as viability assessment and the Vacant Buildings Credit which might have a bearing on the affordable housing which can be derived from piecemeal development.

- 17.12 The Council therefore faces a long and contested process of determining not just 'what the community would like' (which would be strongly debated), but what the regeneration of the site can actually support and achieve given development economics. The idea of a 'not for profit' development or developer exists only if there is a landowner willing to reduce or forgo development value. Whilst the Council might play this role (at a substantial cost) it is most unlikely that any other landowner in Silver Hill could or would do so.
- 17.13 Objectors have stressed the requirements for the Council to follow an EU-compliant procurement process for any redevelopment proposals and to ensure transparency. This excludes the possibility of a 'philanthropist' developer or landowner being promoted since the Council clearly could not enter into any exclusive discussions with such a party.
- 17.14 The procurement and development process that would be required would therefore take a considerable period of time and have considerable cost. It is likely in the current market that the Council would have to take the scheme on through design and planning at its own risk and expense, or at least make a substantial contribution towards these costs. Although it is undoubtedly true that Winchester will have some attractions for prospective developers, they will be aware that securing a favourable outcome is dependent on doing business in a location which has proved challenging for others and this may affect their risk appetite. Although the theoretical prospects for the commercial success of a development may be high (providing they are viable in the first place) they have to be deliverable in a reasonable timescale.
- 17.15 Termination may arise from the Council concluding that the submissions are not acceptable, and SW1 being unable or unwilling to seek to render them acceptable, or (depending on the external legal advice being obtained on the issue) because the Works Commencement Date had not occurred before 1 June 2015 (see Section 8 above). Any specific risks which arise from termination on this latter basis will be included in the appropriate Exempt Appendix.

BACKGROUND DOCUMENTS:

Appendices 1-6, as listed below.

Silver Hill Development Agreement (less exempt information redacted)

APPENDICES:

Appendix 1 – Letter from Dentons 20 May 2015.

Appendix 2 – Letter from Dentons 17 June 2015.

Appendix 3 – Letter from Dentons 18 June 2015.

Appendix 4 – Counsel Opinion David Elvin QC and Richard Moules 17 June 2015.

Appendix 5 – Counsel Opinion – Nigel Giffin QC 15 May 2015.

Appendix 6 – Timeline for Redevelopment (new scheme).

Appendix 7 – Risk Management Table.

Appendix 8 – Summary of Submissions and Assessment of Submissions (to follow).

Exempt Appendix 9 – Social Housing Condition Submission.

Exempt Appendix 10 – Funding Condition Submission.

Exempt Appendix 11 – Summary Financial Appraisal.

Exempt Appendix 12 – Financial Viability Report – Deloitte LLP (to follow).

Exempt Appendix 13 - Financial Viability Report – Knight Frank (to follow).

Exempt Appendix 14 – Report on Fund and Registered Provider (Deloitte LLP) (to follow).

Exempt Appendix 15 – Legal Considerations (to follow).

Exempt Appendix 16 – Counsel Opinion – Works Commencement Date (to follow).

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Our ref: SJA/029915.00001
Your ref: HNB

20 May 2015

Dear Mr Bone

Silver Hill

On behalf of Councillor Kim Gottlieb I have reviewed the Report to Cabinet/Overview and Scrutiny Committee for the meetings on the 21 May 2015.

Please can you make the contents of this letter plain to the Cabinet and the Committee.

Varying the Development Agreement

- 1 Full Council resolved on the 1 April 2015 that the Council would not make any further variations to the Silver Hill Development Agreement until the completion of the Independent Review. Neither the Cabinet nor the Committee have the authority to make a decision contrary to that Full Council resolution.
- 2 In any event an extension to the long stop date would be a material variation to the Development Agreement in favour of the developer and cannot be made without going through a proper procurement process. This is so on two bases:
 - (a) the Development Agreement was originally terminable in 2009. Allowing it to be extended yet further, even in bite size chunks, is material;
 - (b) although it may be argued that the amendment is minor (a matter of months) the benefit to the developer is very significant. In the absence of an extension the Agreement can be terminated on the 1 June. With an extension it cannot be so terminated. In the former situation the developer would lose all past expenditure and the prospect (if any) of making a profit. With an extension those costs would be protected as would the potential profit. That is such a material consequence that the variation requires re-procurement.

Satisfaction of Conditions

- 3 We cannot see how, properly, the conditions in the Development Agreement can be satisfied:

Viability Condition

- (a) Almost regardless of what has been submitted by the developer in relation to the Viability Condition, further information must be required. There will need to be a complete and thorough interrogation of the submitted viability information, and a complete analysis of the "changes" to the assessments previously considered that justify the present conclusion. Against the backdrop of the justification for the proposed 2014 Deed of Variation, the submissions supporting the 2014 planning application and the proposed loss of affordable housing, and the witness statements to the High Court and Court of Appeal, you will forgive some scepticism about the likely adequacy of any developer submission. Under clause 39 of the Development Agreement the Council is entitled to ask for "Additional Information". Given the flexibility of the developer's past submissions we assume that there is an extensive list of Additional Information that is required.

I note that if Additional Information is demanded then that will, almost inevitably, push the date for the satisfaction of the Viability Condition to or beyond the 1 June.

Site Assembly Condition

- (b) We do not believe that the Site Assembly Condition can, properly, be satisfied. The Council cannot, properly, use the confirmed CPO to support development pursuant to an unlawfully procured development agreement.

As you will be aware, this was an issue raised by London & Henley at the CPO Inquiry. The Secretary of State confirmed the CPO on the basis that, at that point, the unlawfulness of the Development Agreement had not been proved. It has now been held by the Court to have been an unlawful procurement process. Accordingly, the Council cannot, in good conscience, resolve to implement the CPO. In the circumstances the condition has not been fulfilled. Alternatively, the Development Agreement has been frustrated by the Council's inability to use the CPO to assemble the land.

Land Appropriation Condition

- (c) The Council are required to satisfy the Land Appropriation Condition. The appropriation process is akin to a CPO. I do not think that the Council can, properly or in good conscience, appropriate land, reducing any existing rights to a right to compensation, to support an unlawfully procured development agreement. As with the Site Assembly Condition, the Land Appropriation Condition either cannot properly be satisfied and/or the Development Agreement has been frustrated.

Works Commencement

- 4 Regardless of whether the conditions have been fulfilled, if the Works Commencement Date has not occurred by the 1 June then the Council has a right to terminate the Agreement on 3 month's notice. The obligation requires the Development Works to have been begun by the carrying out a Material Operation, excluding any Preparatory Works. Accordingly, all demolition, site preparation and decontamination works are excluded.

- 5 So far as we are aware, the pre-commencement conditions under the 2009 planning permission have not been fulfilled. Accordingly, we do not believe:
- (a) that a Material Operation can genuinely be carried out;
 - (b) that works of a nature that would satisfy the requirements of the Works Commencement Date can properly be carried out;

Additional Issues

- 6 Please note that we have not, in this letter, addressed the potential satisfaction of the Funding Condition or the Social Housing Condition. In both cases legally binding agreements are required to be entered into.
- 7 Please note that there will be a requirement for strict proof that these conditions have been satisfied, and satisfied in a way which genuinely secures both the funding and the social rented housing.

Please acknowledge this letter.

Yours sincerely



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Our ref: SJA/029915.00001

17 June 2015

Dear Howard

Silver Hill Development Agreement

The Silver Hill Development Agreement was terminable on 1 June 2015.

Since the Conditions have not been satisfied the Council is under both a public law obligation to serve notice of termination and under a general good practice obligation to consider the service of a notice of termination.

Public Law Obligations

As a responsible public authority, there are two guiding principles that, effectively, dictate the Council's behaviour:

- (a) under the development agreement, and the associated CPO Indemnity Agreement, the Council is obliged to use the confirmed CPO to acquire the outstanding interests in the Silver Hill site. The Council should not exercise draconian confiscatory powers in support of an unlawfully procured agreement if it is possible to avoid doing so. Since the Council has the ability to serve a notice of termination it should do so.
- (b) as a more general proposition, the Council should, where possible and proportionate, act to remedy past unlawful behaviour. This is particularly the case in relation to breaches of procurement law. As you are aware, and as Counsel has noted in the Opinion supporting the report to Council for tomorrow evening, Regulation 73(1)(c) of the 2015 procurement regulations now implies a right to terminate contracts if there have been breaches of procurement law. It follows from the Regulations that where there is a serious breach then, depending on other factors, the procuring authority should exercise that right. Given the lengthy history there is no implied clause in the Silver Hill agreement, but the right to terminate effectively gives the Council a similar power. By parity of reasoning, it should exercise it.

Public Law Responsibilities

Councils are custodians of public money and, just as importantly, the public realm and the environment. They should adopt good practice where possible. Good practice suggests that the Council must, at least, consider the termination of the development agreement, again for two reasons:

- (a) The 2009 consent which was delivered by the development agreement is not as good a scheme as it could be. The most recent Council reports accept that it could be improved. A simple illustration is that keeping an unneeded bus station prejudices the proper planning of the area. In fact, a far better scheme could be designed. When the Council has the ability to avoid a second rate development, in the heart of an historic city, it should, surely, do so?
- (b) Councils are under a continuing obligation to consider whether they are obtaining best consideration in relation to the disposal of any land interests. The ability to terminate the development agreement gives the Council the opportunity to review this and to test the market for best consideration. It could do so with the benefit of the CPO and the marriage value that is inherent in the exercise in that power. If Henderson are claiming that a second rate scheme, carrying £11 million plus of historic development costs, is viable then there must surely be better alternatives that would deliver a greater financial receipt and far wider planning benefits to the Council and the public.

The opportunity to terminate the existing agreement and to secure both a better scheme and a greater payment should be explored.

Conclusion

Depending on the Council resolution tomorrow evening, I may need to write again in relation to these issues. Unless the Council agrees to terminate the development agreement I am likely to be instructed by Councillor Gottlieb to seek a Court declaration that it should do so.

Similarly, if the Council purports to agree that the conditions, particularly the viability condition, have been met then that decision is likely to be challenged. As my letter of the 20th May (attached) indicated, we do not believe that the Council can credibly accept that the conditions are met.

Yours sincerely



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Our ref: SJA/029915.00001

18 June 2015

Dear Mr Whetnall

Silver Hill

I have just been sent a copy of an Opinion from David Elvin QC and Richard Moule dated 17 June. The Opinion responds to issues raised in my letter of the 20 May 2015.

The Opinion uses a typical advocates device. The bulk of the Opinion concentrates on an argument about whether or not the Development Agreement is "*ultra vires and unenforceable*". For the avoidance of doubt we do not make, and have never made, any such assertion. We agree that the Development Agreement is, until properly terminated, an enforceable contract.

Instead my letter of the 20 May indicated that I could not see how the Site Assembly Condition and the Land Appropriation Condition in the Development Agreement could properly be satisfied. In relation to each condition the Council has a discretion to exercise. Because it relates to the confiscation of land it must exercise that discretion in "good conscience".

Paragraphs 28 and 29 of the Opinion effectively accept this. They recommend that the Council sets out very clearly in a Committee Report the reasons why it is considered appropriate to use the CPO to support development under the Development Agreement notwithstanding the breach of the procurement regulations. We agree. For completeness the Report would also have to set out the many factors that suggest why it is not appropriate to use the CPO for such purposes.

My view is that, however clearly the Report is written, the Council will not, properly and in "good conscience", be able to reach a conclusion that it should implement the CPO and/or appropriate land.

The question that each and every Councillor will have to ask themselves faced with such a Report is simple. Is it right to compulsorily acquire third party land to further an unlawfully procured development agreement for an historic scheme. My view is that the only proper or rational answer to that question is "no".

The consequence of will be that the conditions are not fulfilled and the Development Agreement will be incapable of performance.

Yours sincerely

A handwritten signature in black ink, consisting of a stylized 'A' followed by a long horizontal stroke that curves slightly upwards at the end.

Stephen Ashworth
Partner
Dentons UKMEA LLP

WINCHESTER CITY COUNCIL

RE: SILVER HILL AND LAWFULNESS OF THE CPO

OPINION

(1) Introduction

1. We are instructed to advise Winchester City Council (“the Council”) in respect of the Silver Hill redevelopment scheme. In particular, we are asked to advise whether Dentons are correct in contending in their letter of 20 May 2015¹ that the Council cannot lawfully use the confirmed CPO to support development pursuant to an unlawfully procured development agreement.
2. A summary of our conclusions is set out at the end of this Opinion.

(2) Factual Background

3. We are instructed that Henderson has decided to attempt to discharge the outstanding conditions under the 2004 development agreement (“the DA”) with the intention of building out the 2009 scheme. Henderson has submitted applications in relation to what it considers to be the three remaining conditions that cannot be waived by the developer, namely the socially rented housing condition, the funding condition and the financial viability condition. The Council considers that the site assembly condition was satisfied on 5 February 2014 when the challenge to the CPO was withdrawn.
4. The Council’s Cabinet and Overview Scrutiny Committee considered an update report on 21 May 2015² and decided not to agree to extend the longstop date for the DA of 1 June 2015. We are instructed that discussions are still ongoing in relation to the satisfaction of the three conditions referred to above.
5. Lang J.’s decision in *R (Gottlieb) v Winchester City Council* [2015] EWHC 231 (Admin) quashed amendments to the DA necessitated by the 2014 scheme which had been authorised on 6 August 2014. The scope of the claim is encapsulated in the Judge’s summary of the parties’ arguments at [6]-[7]:

¹ Enclosure 4 to our Instructions.

² Enclosure 5 to our Instructions.

“6. The Claimant contends that the variations to the Development Agreement are such as to require a procurement exercise to be undertaken on the ground that they are materially different in character from the original contract and, therefore, are such as to demonstrate the intention of the parties to renegotiate the essential terms of the contract. The variations changed the economic balance of the contract in favour of the developer in a manner which was not provided for in the terms of the initial contract.

7. The Council's response is that the variations are not materially different in character. They were made in accordance with variation clauses in the Development Agreement, and they do not change the overall nature of it. They still fall within the scope of the original brief. Some of the changes were prompted by external causes; others by changes in circumstances since 2004. The Council has taken independent professional advice which states that the changes do not alter the economic balance in favour of the developer. Indeed, the Development Agreement, as varied, is a more favourable arrangement than the Council would be likely to obtain in the market.”

6. The following paragraphs of Lang J's judgment deal with the original failure to procure the DA:

“10. The Council did not carry out a procurement exercise when it entered into the Agreement. The development opportunity was not advertised in the Official Journal of the European Union and no competition between developers was held.”

“39. EU law on public procurement is intended to eliminate barriers to the movement of business, labour, and capital within the EU, in the belief that a common market will improve overall economic welfare and growth. Restrictive procurement practices by public bodies (in particular, entering into contracts only with preferred domestic contractors) does not allow for fair competition between firms from other member states and may result in market distortions.

40. The Development Agreement was initially entered into by the Council on 22 December 2004. At that time, the relevant legislation was Council Directive 93/37/EEC (“the 1993 Directive”) and the Public Works Contracts Regulations 1991 (“the 1991 Regulations”) which applied to development agreements of this kind (Case C-220-05 *Auroux & Ors v Roanne* [2007] ECR I-00385).

41. “Public works contracts” were defined by Article 1(a) of the 1993 Directive to mean “contracts for pecuniary interest concluded in writing between a contractor and a contracting authority ... which have as their object either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II or a work defined in (c) below, or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority.” (Annex II listed various activities related to building and civil engineering work including demolition, construction of both residential and non-residential buildings, installation of fixtures and fittings, and building completion work).

42. A “public works concession contract” was defined by Article 1(d) of the 1993 Directive as being a contract of the same type as a public works contract “except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the construction or in this right together with payment.”

43. Similarly, a “public works concession contract” was defined under the 1991 Regulations as “a public works contract under which the consideration given by the contracting authority consists of or includes the grant of a right to exploit the work or works to be carried out under the contract”.

44. The Development Agreement could be categorised as a concession contract because it provided for the developer to be paid a majority share of the profits of the development, and to be granted a lease of the site under which tenants occupying the site would then pay rent to the developer.

45. The applicable requirements under the 1993 Directive in relation to a public works concession contract were contained in Articles 3(1), 11(3), 11(6)-(7), 11(9)-(13) and 15. The corresponding requirements under the 1991 Regulations were contained in Regulations 5, 25 and 30 .

46. In summary, their effect was that:

i) The Council was required to publish a notice in the Official Journal of the EU, in accordance with the model in Annex V of the Directive, specifying the following information (among other matters): Article 11(3) and (6) and Annex V of the Directive, and Regulation 25(2) :

a) the contact details of the Council including the address from which further information and documentation concerning the proposed public works concession contract could be obtained, and the address to which candidatures must be sent;

b) a description of the concession contract to be awarded;

c) the scope of the contract;

d) the conditions for participation in the competition to be awarded the contract (including information relating to the bidder's legal position, and as to its economic, financial and technical capacity); and

e) the award criteria for the contact.

47. The notice could not be published in the contracting authority's home press until it had been dispatched to the Official Journal. Any notice in the home press could not contain information other than that published in the Official Journal: Article 11(11) of the Directive and Regulation 30(4).

48. Contracting authorities had to fix a time limit for receipt of applications for the concession, not less than 52 days from the date of dispatch to the Official Journal: Article 15 of the Directive and Regulation 25(3).

49. Upon receipt of applications, the contracting authority was required to complete a tendering process in accordance with the published information. The detailed procedures under the Directive applicable to ordinary public works contracts did not apply, but the tendering process had to be compatible with Treaty principles of freedom of establishment and freedom to provide services, as well as those of equal treatment, non-discrimination and transparency.

50. The Council ought to have complied with the procurement requirements set out above, but did not do so, in reliance on mistaken legal advice. Instead it entered into an agreement with Thornfield Properties because it had a pre-existing commercial relationship with Stagecoach to redevelop its bus station on the site. No other contractors were considered. It is now too late to challenge the lawfulness of the Development Agreement on this basis. (emphasis added)

“(7) Discretion to refuse relief

143. The Council submits that the court ought to refuse a remedy in the exercise of its discretion because:

i) No useful purpose would be served by quashing the decision given independent expert evidence to the effect that the Development Agreement as varied represents “a good deal” for the Council which would be better than any developer in the market would be likely to offer; and

ii) The Claimant (a non-economic operator) has no interest in the observance of the public procurement regime.

144. Counsel referred me to *Berkeley* [2001] 2 AC 603, *Walton v Scottish Ministers* [2013] PTSR 51, *Edenred* (supra), *R v. Department of Transport, ex p Presvac Engineering Ltd* (1992) 4 Admin L.R. 121 and *R v. Criminal Injuries Compensation Board ex p P* [1995] 1

W.L.R. 845

145 In my judgment, the Council has committed a serious breach of the procurement regime, which is both substantive and procedural in nature. This is the second occasion upon which it has committed such a breach in the lifetime of one contract. It would be an exceptional course to allow its unlawful decision to stand.

146 The Council's failure to follow an open, competitive, transparent and non-discriminatory procurement process for such an important contract, at any stage, casts real doubt on whether the scheme proposed by the Developer is the best scheme on the best terms available.

...

153 This claim is distinguishable on the facts from *R (Chandler) v Secretary of State for Children, Schools and Families* [2010] LGR 1, where the court held that the claimant lacked standing to bring a judicial review claim because she did not have any interest in the observance of the public procurement regime, being motivated by her political opposition to academy schools. In contrast, the Claimant in this case does not pursue any ulterior motive. He seeks what the procurement process is intended to provide, namely, an open competition to allow Winchester to select the development which best fulfils its needs."

7. There has been some debate about what the effect of Lang J.'s decision has on the DA given her conclusion that the DA should have been the subject of a procurement process originally. In a briefing note (18 Feb 2015) Eversheds stated:

"5. This is a rare example of the Courts granting Judicial Review of a decision to vary a contract in breach of the relevant procurement regulations. The precise effect of the Court's order quashing the Council's decision to vary the Development Agreement in these circumstances is, as a result, not entirely clear. In a public statement the Council has suggested it is considering its ability to continue to work with the developer within the constraints of the pre-existing Development Agreement. However, given the Court's conclusion that the original contract should have been the subject of a procurement process, both parties will no doubt be concerned that the original contract may be *ultra vires* and therefore unenforceable."

8. Denton consider that the DA is *ultra vires* and unenforceable as a result of Lang J.'s decision, and also that the Council cannot lawfully use the confirmed CPO to support development pursuant to an unlawfully procured development agreement. Denton's letter of 20 May 2015 stated:

"3. We cannot see how, properly, the conditions in the Development Agreement can be satisfied:

...

Site Assembly Condition

(b) We do not believe that the Site Assembly Condition can, properly, be satisfied. The Council cannot, properly, use the confirmed CPO to support development pursuant to an unlawfully procured development agreement.

You will be aware, this was an issue raised by London & Henley at the CPO Inquiry. The Secretary of State confirmed the CPO on the basis that, at that point, the unlawfulness of the Development Agreement had not been proved. It has now been held by the Court to have been an unlawful procurement process. Accordingly, the Council cannot, in good conscience, resolve to implement the CPO. In the circumstances the condition has not been fulfilled. Alternatively, the Development Agreement has been frustrated by the Council's inability to use the CPO to assemble the land.

Land Appropriation Condition

(c) The Council are required to satisfy the Land Appropriation Condition. The appropriation process is akin to a CPO. I do not think that the Council can, properly or in good conscience, appropriate land, reducing any existing rights to a right to compensation, to support an unlawfully procured development agreement. As with the Site Assembly Condition, the Land Appropriation Condition either cannot properly be satisfied and/or the Development Agreement has been frustrated."

9. In the light of Denton's letter, it is necessary to set out what the Inspector and the Secretary of State said about the procurement arguments raised by London and Henley at the CPO inquiry. At that time, SNR Denton were instructed by London and Henley and represented them at the inquiry³. The Inspector summarized London and Henley's case as follows:

5.27 *Developer agreement*: The developer agreement (DA) underlying the CPO does not accord with current relevant European Union procurement requirements and the Public Contract Regulations 2006. There was no competitive tendering process preceding the DA. Following the ruling of the Court of Justice of the EU in *Auroux v. Roanne* [2007] All E.R. (EC) 918 (January 2007)⁴ it is clear the development agreement should be compliant with EU and UK procurement requirements. Therefore, the original approach to procurement was unlawful, and the subsequent variations were themselves unlawful. In the absence of any competitive bid and any approved scheme, it is unclear how WCC were advised that the terms negotiated with the developer who had already secured an exclusivity arrangement, were the best that were reasonably obtainable.

...

5.29 To found a Compulsory Purchase Order upon such arrangements is not in the public interest. The Framework advises that planning decisions must reflect and where appropriate promote relevant EU obligations and statutory requirements⁵. This further reduces the merits of confirmation of the CPO."

10. The Inspector summarised the Council's response at paragraphs 5.50-5.51:

5.50 The making of the Order is valid and lawful. The change of ownership of the share capital of Thornfield did not require the consent of the Council. At this time minor variations were made to the Development Agreement, none of which were considered to have created a new commercial opportunity or require the process to be reopened. WCC's decisions throughout this process have been informed by legal advice. The Council acted in good faith and in accordance with independent professional advice at all stages of the procurement process. There was no challenge to the Development Agreement or any of the subsequent variations at the time they were made, nor to the change in ownership of the share capital of the Developer. Any challenge as to the actions taken by WCC, or the validity of the Development Agreement is now out of time.

5.51 The absence of market bids does not mean that State Aid is conferred. L&H make the point without producing marriage values or transfer of value and there is no evidence to support their point. Equally there is no evidential basis for a claim that the DA does not obtain best value. WCC has a duty to obtain the best price reasonably obtainable in its agreement to grant a lease to the Developer in the DA and has taken independent advice in accordance with Commission Guidance.

³ See List of Appearances, p. 41 of the IR.

⁴ INQ/23/1

⁵ CD3.1

11. The Inspector's conclusion was that:

7.21 The objectors questioned the legitimacy of the DA. They referred to case law which established that a DA can be subject to public procurement rules which require a competitive process. While the DA was not founded on a competitive process, it has never been legally challenged nor has it been established that it is not a legitimate document. The Framework advises that planning decisions should promote relevant EU obligations and statutory requirements and the CPO must be found to be in the public interest. However, there is no legal judgment or decision which finds that the process upon which the DA was founded was unlawful. The DA remains a lawful and valid document capable of achieving its aims to bring about the redevelopment of Silver Hill. There is no detailed evidence indicating that the DA is not 'best value' for WCC or that 'best consideration' for disposal of land by WCC has not taken place and no firm evidence that 'State Aid' has been conferred as alleged. None of these matters are of sufficient substance to indicate that confirmation of the CPO will not be in the public interest."

12. The Secretary of State's decision letter agreed with the Inspector. Paragraph 8 stated:

"8. The Secretary of State for Communities and Local Government (SSCLG) has given careful consideration to the correspondence received from SNR Denton UK LLP, on behalf of the London & Henley Group of Companies, following the public local inquiry which seeks refusal of confirmation of the CPO on the grounds of the legitimacy of the development agreement, together with subsequent correspondence from Berwin Leighton Paisner. He agrees with the Inspector that whilst the development agreement was not founded on a competitive process, it has never been legally challenged nor established that it is not a legitimate document. There is no detailed evidence that the development agreement is not "best value" for Winchester City Council or that "best consideration" for the disposal of land has not taken place and no firm evidence that "State Aid" has been conferred. None of these matters are of sufficient substance to indicate that confirmation of the CPO would not be in the public interest and the SSCLG sees no reason to disagree with the Inspector's conclusions."

13. It was therefore clear that submissions had been made to the Inspector and Secretary of State about the lack of procurement of the DA and its relevance to the CPO, but the decision to confirm the CPO was made notwithstanding those contentions. The reference to "not a legitimate document" is capable of being a reference to the Council's point that any challenge to the DA would be long out of time.

14. The Council has obtained advice from Nigel Giffin Q.C.⁶ as to whether the DA could be considered now to be void and/or unenforceable given that it was not procured as a result of Lang J's comments set out above. In summary, his advice was that:

- (1) The effect of Lang J's decision was, on the face of it, simply to leave the DA as it stood prior to the decision to vary it i.e. as it was concluded in 2004 subject to the variations made between 2009 and 2014;
- (2) In 2004 the Council acted in breach of the Public Works Contracts Regulations 1991;

⁶ His Opinion dated 15 May 2015 is at Enclosure 6 of our Instructions.

- (3) A breach of the public procurement legislation does not, as such, invalidate the resulting contract. Once a contract has been concluded, the remedies are damages or a declaration of ineffectiveness which must be sought within 6 months and which did not exist as a remedy in 2004;
 - (4) The procurement legislation does not provide for automatic invalidity and the particular provision it makes in respect of concluded contracts is inconsistent with any such consequence;
 - (5) Breach of the procurement rules is also a breach of the authority's public law obligations capable of being challenged in judicial review (see *R (Chandler) v Secretary of State for Children, Schools and Families* [2010] L.G.R. 1);
 - (6) It is inconceivable that permission for judicial review would be given, so long after the event, to challenge the original DA;
 - (7) Short of Supreme Court authority, the Court of Appeal's decision in *Charles Terence Estates Ltd v Cornwall Council* [2013] 1 W.L.R. 466, establishes that a contract concluded in breach of public law obligations does not result in the contract being treated as void and unenforceable in private law, save where the contract is outside the capacity of the authority, i.e. a contract of a kind it has no power to make – which is not the case here, where there has been a breach of procedural requirements;
 - (8) Consequently, the fact that entry into the DA in 2004 may have been in breach of the Public Works Contract Regulations 1991 does not render the DA void or unenforceable now.
15. Against that background, we are asked to advise the Council in relation to the matters raised in Denton's letter at paragraphs 3(b) and 3(c).

(3) Analysis of the question asked

16. In our view, the Council could lawfully use the confirmed CPO to support development pursuant to the DA notwithstanding Lang J.'s decision. The continued validity of the DA was the context in which submissions were made to the CPO inquiry by the Council and accepted by the Secretary of State notwithstanding the submissions by London and Henley, Denton's client at the time.
17. Turning first to Denton's arguments at paragraph 3b of their letter, in our view there are a number of incorrect elements in the reasoning. It is contended that:
- (1) The DA is "an unlawfully procured development agreement";

- (2) The Secretary of State confirmed the CPO “on the basis that, at that point, the unlawfulness of the DA had not been proved”;
 - (3) The DA “has now been held by the Court to have been an unlawful procurement process”; and
 - (4) The Council cannot in “good conscience” resolve to implement the CPO.
18. As to point (1), it is incorrect to state that the DA was “unlawfully” procured or at least the characterization is misleading as to the current status of the DA. As Nigel Giffin Q.C. has advised, the fact that entry into the DA in 2004 may have been in breach of the Public Works Contract Regulations 1991 does not render the DA void or unenforceable now. Therefore, if by “unlawful”, Denton seeks to suggest that the DA is void or unenforceable then they are wrong for the reasons given by Nigel Giffin Q.C. The reality is that the DA was entered into in breach of the Public Works Contract Regulations 1991, as was known at the time of the CPO inquiry, but that does not affect the validity or enforceability of the DA.
 19. There is nothing in Lang J.’s judgment that undermines that view. Indeed, the continuing validity of the DA was not the subject of the judicial review but whether there had been a material variation to it which warranted procurement: see the judgment at [1]-[6]. In her judgment at [10], Lang J. recognized that the DA was entered into without a procurement process and she described the breach in greater detail at paragraphs 39-49. Critically, at paragraph 50, she stated expressly that “*it is too late to challenge the lawfulness of the Development Agreement on this basis*”. In other words, she acknowledged that the DA was currently “lawful” and that it was too late for anyone to try to establish that it was “unlawful”.
 20. At section 7 of her judgment, the Judge was dealing with the issue of standing to challenge the variations to the DA and its relevance to the exercise of the Court’s discretion to refuse relief. She said at [144] that “*the Council has committed a serious breach of the procurement regime, which is both substantive and procedural in nature. This is the second occasion upon which it has committed such a breach in the lifetime of one contract*”. We do not consider that she was (or could) make any findings about the validity or enforceability of the DA. Having already held that the DA could not be challenged, Lang J. was clearly not contradicting herself and purporting to declare the DA void or unenforceable. She simply recorded the fact that the DA was entered into in breach of the Public Works Contract Regulations 1991, without resiling from her earlier view that the breach was immune from challenge now. The case was not a challenge to the lawfulness of the DA, the relief granted did not concern the validity of the DA and the Judge stated in terms that the lawfulness of the DA could not be challenged. We do

not therefore consider that that Council is required, or able, to treat the DA as void or unenforceable.

21. As to point (2), the Secretary of State did not confirm the CPO "on the basis that, at that point, the unlawfulness of the DA had not been proved". Instead, read fairly and as a whole, the Inspector's report and the Secretary of State's decision letter show that the CPO was confirmed because the DA was (and would continue to be) immune from being quashed or otherwise rendered void due to the lack of challenge within the relevant time limit. That was the Council's case to the CPO inquiry and it was accepted by the Secretary of State.
22. At IR 7.21, the Inspector recognized that the DA was not founded on a competitive process, but also found that it had not been established "that it is not a legitimate document" consequently "the DA remains a lawful and valid document capable of achieving the aims to bring about the redevelopment of Silver Hill". The Secretary of State agreed with the Inspector and at paragraph 8 of the decision letter he stated that notwithstanding the lack of a competitive process, it has not been established that the DA "is not a legitimate document".
23. In our view, as set out above, both the Inspector and the Secretary of State were fully aware of the lack of a procurement process and they decided that the CPO should be confirmed notwithstanding that fact. They correctly recognized that the DA had not and could not be challenged out of time and that consequently it was a lawful and valid document capable of achieving the aims to bring about the redevelopment of Silver Hill. Their view fully accords with the conclusions reached by Nigel Giffin Q.C. i.e. the fact that entry into the DA in 2004 may have been in breach of the Public Works Contract Regulations 1991 does not render the DA void or unenforceable now. It is also consistent with what Lang J said at paragraph 50 of her judgment.
24. As to point (3), it is incorrect to state that the DA "has now been held by the Court to have been an unlawful procurement process". As set out above, we do not consider that Lang J's judgment decided that the DA was unlawful in the sense of being void or unenforceable. There was no issue that there had been compliance with the 1991 Regulations. The judge merely recorded that the Council had breached the Public Works Contract Regulations 1991, but that did not affect the validity or enforceability of the DA.
25. Finally, as to (4), we do not consider that the Council is bound to resolve not to implement the CPO in the light of the High Court's (strictly *obiter*) view that in 2004 it breached the Public Works Contract Regulations 1991 when it entered into the DA. Indeed, the Council knew at the time it made the CPO that the DA had been entered

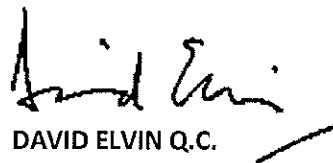
into without a procurement process and had taken advice at the time about whether the DA could now be challenged.

26. It is possible to challenge vesting decisions on public law grounds e.g. improper purpose *R (Argos Limited) v Birmingham City Council* [2012] J.P.L 401. But we do not consider that it is *per se* unlawful for the Council to resolve to implement the CPO in order to support development pursuant to the DA. The Council merely has to consider whether to use the CPO to support the development under the DA lawfully in public law terms. The position is not significantly different from that at the inquiry, now than that the proposed variation is known not to be lawful. There are many rational reasons why, in the public interest, it is appropriate to resolve to implement the CPO which the Council may choose to rely on. The Council needs to consider those, together with the original breach of the Public Works Contract Regulations 1991, together with the circumstances as known at the time of the CPO inquiry and decision, and to explain clearly why it is now reasonable to proceed.
27. The breach of the Public Works Contract Regulations 1991 is not a new point and both the Inspector and the Secretary of State were aware of the allegation and the relevant facts. As set out above, they proceeded on the basis that the CPO should be confirmed given that the DA was enforceable and would deliver a redevelopment that was in the public interest. The position remains unchanged and indeed, Lang J has confirmed that the DA cannot now be challenged. The historic breach of the Public Works Contract Regulations 1991 does not therefore undermine the basis on which the CPO was confirmed, or render a decision to implement the CPO to support the development under the DA unreasonable.
28. We recommend that the Council sets out very clearly in a committee report the reasons why it is considered appropriate to use the CPO to support development under the DA notwithstanding the breach of the Public Works Contract Regulations 1991 in 2004. If it is thought helpful, we would be able to advise further in relation to the drafting of such a report in due course.
29. Turning next to paragraph 3(c) of Denton's letter, in our view this largely repeats the "good conscience" point that we have dealt with above. It can appropriate land provided it reaches a rational conclusion i.e. gives logical and legitimate reasons for using the CPO to support development under the DA notwithstanding the breach of the Public Works Contract Regulations 1991 in 2004.

(4) Conclusion

30. For the reasons given above, our view is that:

- (1) The Council could lawfully use the confirmed CPO to support development pursuant to the DA notwithstanding Lang J's decision;
 - (2) It is incorrect (or at least misleading) to state that the DA was "unlawfully" procured. The true position is that notwithstanding the breach of the Public Works Contract Regulations 1991 in 2004, the DA remains valid and enforceable;
 - (3) The Secretary of State did not confirm the CPO "on the basis that, at that point, the unlawfulness of the DA had not been proved". Instead, read fairly and as a whole, the Inspector's Report and the Secretary of State's decision letter show that the CPO was confirmed because the DA was (and would continue to be) immune from being quashed or otherwise rendered void due to the lack of challenge within the relevant time limit (consistent with the Council's case);
 - (4) We do not consider that the Council is bound to resolve not to implement the CPO in the light of the High Court's (strictly *obiter*) view that in 2004 it breached the Public Works Contract Regulations 1991 when it entered into the DA;
 - (5) The Report to committee should explain very clearly why it is considered in the public interest to implement the CPO notwithstanding the breach of the Public Works Contract Regulations 1991; and
 - (6) The Council can appropriate the land provided it reaches a rational conclusion i.e. gives logical and legitimate reasons for using the CPO to support development under the DA notwithstanding the breach of the Public Works Contract Regulations 1991 in 2004.
31. We have nothing to add as presently instructed but would be pleased to advise further should it be necessary.



DAVID ELVIN Q.C.

RICHARD MOULES

Landmark Chambers
London EC4A 2HG
17 June 2015

WINCHESTER CITY COUNCIL: SILVER HILL DEVELOPMENT

OPINION

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

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

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

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

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

CONCLUSIONS

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

NIGEL GIFFIN QC

11KBW

15 May 2015

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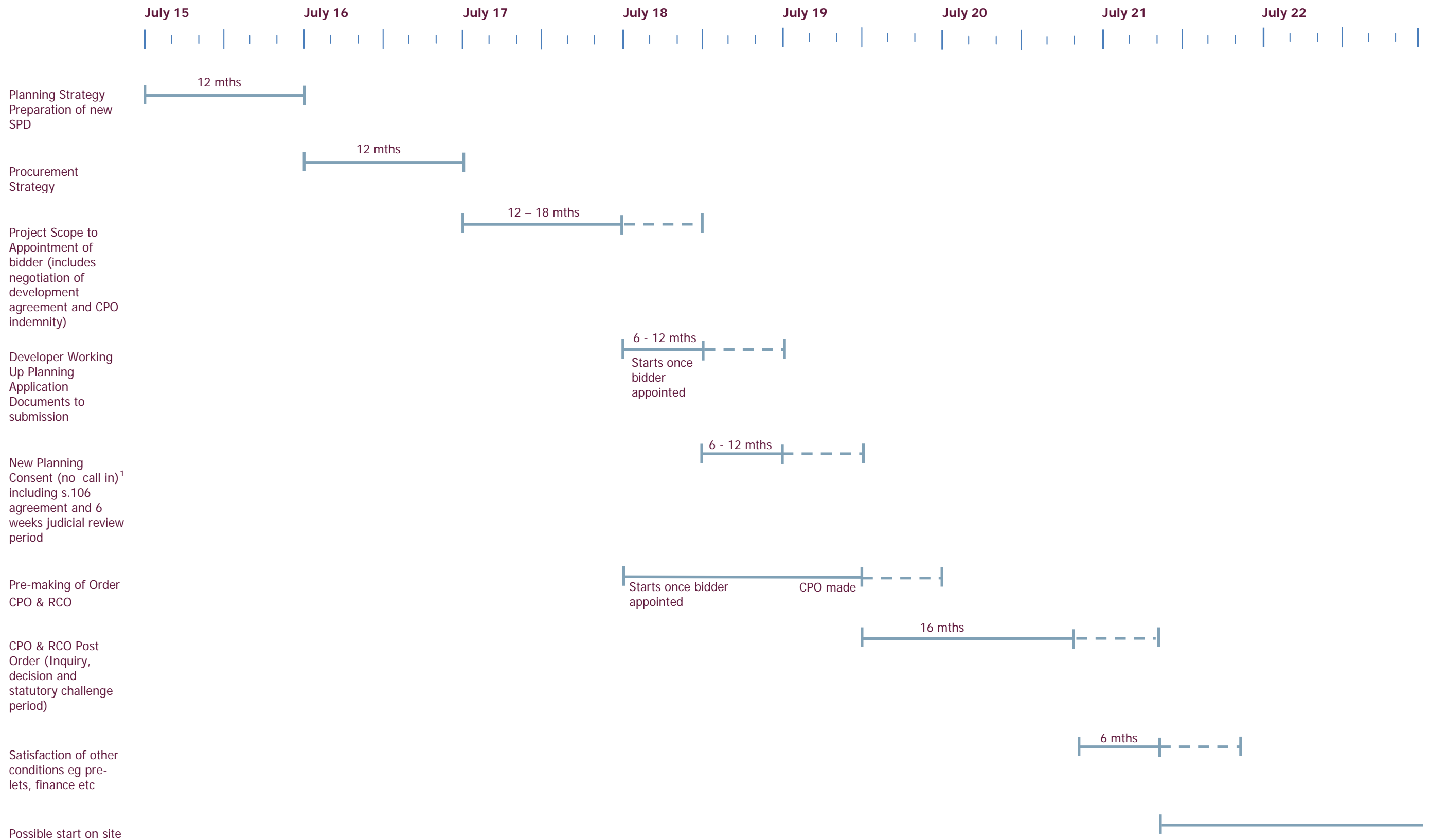
IN THE MATTER OF
WINCHESTER C.C.

AND IN THE MATTER OF THE
SILVER HILL DEVELOPMENT

OPINION

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Ref. RNTL/23528.10



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

Silver Hill – Risk Evaluation

Risk Ref: CR5002	Risk Score 2015:	Likelihood= Likely Impact = Significant	Previous Score:	Likelihood = Highly Likely Impact = Significant	Risk Owner: Corporate Director	
Risk Title: Silver Hill						
Risk No.	Description of risk	Likelihood	Impact	How will the risk be managed?		Assigned to
If it is agreed the conditions are met:						
1	Funder/Developer/RP fails to comply with terms of legal agreements each has entered into with each other or the Council	Unlikely	Major	Legally binding agreements will have been entered into as these are necessary for conditions to have been met. Council will be robust in expecting all parties to meet their obligations.		Project Team
2	Developer fails to start development 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
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

Risk Ref: CR5002	Risk Score 2015: Likelihood= Likely Impact = Significant	Previous Score: Likelihood = Highly Likely Impact = Significant	Risk Owner: Corporate Director		
Risk Title: Silver Hill					
Risk No.	Description of risk	Likelihood	Impact	How will the risk be managed?	Assigned to
If Council wishes to obtain modification of proposals to satisfy conditions before approving:					
7	Developer may be unable or unwilling to make necessary modification to satisfy Council	Likely	Major	Council would reappraise risk position before making final decision	Project Team
If the Council terminates the contract:					
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 consequences, including investor appetite for working with the City Council	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
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

Risk Ref: CR5002		Risk Score 2015: Likelihood= Likely Impact = Significant	Previous Score: Likelihood = Highly Likely Impact = Significant	Risk Owner: Corporate Director		
Risk Title: Silver Hill						
Risk No.	Description of risk	Likelihood	Impact	How will the risk be managed?	Assigned to	
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 creates negative perception of Winchester as shopping destination.	Likely	Moderate	Ensure a scheme progresses as quickly as possible including replacement car park	Project Team/Cabinet	