

WAVERLEY BOROUGH COUNCIL

SPECIAL EXECUTIVE – 24 APRIL 2012

Title:

BRIGHTWELLS/EAST STREET DEVELOPMENT FARNHAM – COMPULSORY PURCHASE

[Portfolio Holder: Cllr Adam Taylor-Smith]

[Wards Affected: All Farnham Wards]

Note pursuant to Section 100B(5) of the Local Government Act 1972

Annexes to this report contain exempt information by virtue of which the public is likely to be excluded during the item to which the report relates, as specified in Paragraph 3 of the revised Part I of Schedule 12A to the Local Government Act 1972, namely:-

Information relating to the financial or business affairs of any particular person (including the authority holding that information).

Summary and purpose:

The purpose of this report is to authorise actions necessary to implement the Council's decision, resolved in November 2008 and first discussed in December 2005, for the making of a Compulsory Purchase Order (CPO) pursuant to Section 226(1)(a) and (3) of the Town and Country Planning Act 1990 (TCPA) to acquire the land and premises on which the former Regal Cinema was erected and the Marlborough Head Public House, Farnham and other land as shown in red on the plan at Annexe 1 ("the Sites"), in order to facilitate the carrying out of a scheme of development, re-development and improvement at East Street/Brightwells, Farnham ('the Brightwells Development').

How this report relates to the Council's Corporate Priorities:

The Council has a clear priority to regenerate the East Street Area of Farnham and has an important role to play in working to ensure an increased supply of affordable housing for rent or shared ownership. The Brightwells Development will provide 72 new, affordable housing units. The provision of shops, restaurants and leisure facilities, including a cinema, will provide attractions for all age groups within the town, and the development also makes provision for open spaces and community facilities in a convenient central location.

Equality and Diversity Implications:

There are no equality and diversity implications arising from this report.

Resource/Value for Money implications:

Under the development agreement between the Council and Crest Nicholson/Sainsbury's (CNS), either party can secure ownership of the parts of the development site which are not already in Council ownership. The Development Agreement includes a formula on how the acquisition costs will be shared. CNS has agreed to indemnify the Council against half of the costs relating to the contractual obligation to acquire the site through a successful CPO and have entered into a formal indemnity agreement. CNS also indemnified the Council in respect of the purchase price/compensation payments in connection with acquiring the sites, although these are taken into account in the Minimum Land Value (MLV) formula set out in the development agreement. If Waverley Borough Council did not achieve or proceed with the CPO then the Council would incur abortive costs.

The Council's share of these costs will be met from the eventual capital receipt. Budget provision has been included in the 2012/13 Capital Programme. The acquisition costs of both sites will be met from the eventual capital receipt.

Legal Implications:

The Council has the powers set out in detail in paragraph 11 below. There is a legal procedure to be followed in pursuing Compulsory Purchase which is set out in further detail in this report.

Background

1. The regeneration of the East Street/Brightwells area and the opportunities for improving this eastern part of Farnham town centre emerged in the 1990's, and prompted the Council to adopt a planning-led approach. In 2000 a Planning Brief was adopted by the Council as a framework to guide the co-ordinated redevelopment of the area. This Planning Brief identified an Area of Opportunity which included the Brightwells site, a large amount of which was in the Council's ownership.
2. The Waverley Borough Local Plan was adopted in 2002 and this plan identified the area as the "East Street Area of Opportunity". In 2003, following a tendering process, Crest Nicholson Developments Limited and Sainsbury's Supermarkets Limited (CNS) were selected as the Council's preferred development partners. A Development Agreement with CNS was entered into by the Council in 2003.
3. Waverley, as the largest landholder, agreed Landlord's Consent for a preferred scheme in 2006, with further Landlord's Consent in 2007 and consequently CNS prepared and submitted a mixed-use planning application under reference WA/2008/0279 for the redevelopment of East Street. This application was agreed at the Joint Planning Committee Meetings on 1 October 2008 and 29 October 2008 and, following the completion of a Section 106 Agreement, planning consent was issued on 6 August 2009.
4. The Council set out its policy intention in November 2008 to make a Compulsory Purchase Order if necessary to acquire the parcels of land within the development area which are not in its ownership.

Development Proposals

5. The planning permission authorises a mixed-use redevelopment of the East Street Area of Farnham including:
 - 9,814 sq m of new retail, cafe, restaurant and bar floorspace;
 - 239 new residential properties comprising:
 - 167 for private sale [70%]
 - 36 affordable shared ownership [15%]
 - 36 affordable rental [15%]
 - A cinema;
 - New public open space areas including a new town square;
 - Landscaped garden areas;
 - Provision for a new Gostrey/Community Centre;
 - New surface, basement parking facilities and a multi-storey car park with the provision of 400 car parking spaces including 3 spaces for use by a Car Club.

Why a CPO is needed

6. The majority of the land involved belongs to Waverley Borough Council. Annexe 1 shows the sites that are not in the Council's ownership and that will be the subject of the Compulsory Purchase Order (CPO). The principal lands to be acquired compulsorily are two parcels of land in private ownership: the site of the former Regal Cinema which is owned by F&C Reit; and the Marlborough Head Public House, which is owned by Greene King Brewery (shown as land parcels 2&5 respectively in Annexe 1). The remaining lands to be acquired are required for the purposes of the Brightwells Development but ownership of those lands is uncertain (shown as land parcels 1 and 3 in Annexe 1). In these circumstances, compulsory purchase of those lands is required in order to ensure that the timely implementation of the Brightwells Development is not prejudiced by the existence of private interests and that the Council obtains full legal title for that purpose. Similarly it is necessary to include the strip of land in Cambridge Place, owned by Waverley (Parcel 4) to extinguish any other interests or rights over this land.
7. Despite attempts to agree terms for the private treaty acquisition by negotiation, the owners of the two principal lands to be acquired have so far been unwilling to sell by private treaty. It is therefore necessary to proceed with compulsory purchase pursuant to Section 226(1)(a) of the Town and Country Planning Act 1990 (TCPA) and to make a Compulsory Purchase Order, in order to enable the Brightwells Development to proceed and the planning permission to be implemented for that purpose. The Statement of Reasons at Annexe 2 sets out the Council's justification for compulsory purchase of this land.

8. There is very limited statutory guidance on the grounds of objection. In general, any objection will be valid if properly made. However, there are limited cases in which the authorising authority is entitled to disregard objections. These are:
- (a) if it is satisfied that the objection relates exclusively to matters which can be dealt with by the tribunal by whom the compensation is to be assessed (s.13(4) Acquisition of Land Act 1981); and
 - (b) in the case of a CPO made under s.226 of the TCPA where the objection amounts to an objection to the provisions of the development plan defining the proposed use of land (s.245 TCPA 1990).

Programme

9. The draft programme for the compulsory purchase process is set out below. It makes allowance for the likely requirement for a public inquiry to hear objections to the compulsory purchase order, at which stage the procedure passes to the Secretary of State as the confirming authority.

Making of the CPO order	May 2012
Public notification and advertisement Process	2 consecutive weeks In local press
Period for objections	Minimum 21 days (but propose allowing 28 days)
If CPO unopposed: Secretary of State decision confirming or dismissing the order.	approx 3 months (from date of order)
If CPO has been opposed by an interested party: Public Inquiry preparation	approx.4 months (from date of order)
Public Inquiry	approx 1 week
Secretary of State decision	approx 4 months (from the end of the inquiry)
Potential High Court appeal (on a point of law)	6 weeks
Taking possession and settlement/payment of affected land owners' compensation	to be confirmed

10. The timescales for the CPO Inquiry and the Secretary of State response period is based on legal advice on previous experience. It is possible that these periods could be considerably less depending upon the amount of pending applications being dealt with at that time. It is still hoped that a private treaty acquisition by agreement will be possible.

Statutory Authority for Making the CPO

11. Subject to authorisation by the Secretary of State, the Council is empowered to acquire land compulsorily for planning purposes under Section 226 of the TCPA. The powers in Section 226 are expressed in wide terms. They are intended to provide a positive tool to help local authorities with planning powers to assemble the land required for and to facilitate the carrying of schemes of development, redevelopment and improvement in their area; and so to fulfil their planning policy and regeneration objectives.
12. The Council must be satisfied under Section 226(1A) that this scheme of development, redevelopment and improvement will contribute to achieving the promotion or improvement of the economic, social or environmental well-being of its area (i.e. the area covered by Waverley Borough Council). The justification for exercising the Council's powers of compulsory purchase under Section 226(1) and for being so satisfied under Section 226(1A) of the TCPA is set out in the Statement of Reasons set out in Annexe 2.
13. The Secretary of State for Communities and Local Government will decide whether to confirm the CPO, having considered the merits of the scheme and any objections by way of public inquiry.

Acquisition and Extinguishing of Rights

14. In addition to the Compulsory Purchase of land under Section 226(1) (a) of the Town and Country Planning Act (TCPA), the Council has to deal with the following rights of adjacent properties which will be affected by the development.
 - a. The acquisition of rights under Section 13 of the Local Government (Miscellaneous Provisions) Act 1976 for crane oversailing and access to adjoining land to erect hoardings and carry out necessary construction works;
 - b. The extinguishing of other rights which may be in conflict with the development. These will be exercised through the following sections of the TCPA:
 - i. Section 236 – the powers for the extinguishment of private rights over land acquired compulsorily
 - ii. Section 237 – the power to override easements affecting development land
 - iii. Section 271 – the power to extinguish rights of Statutory Undertakers; and

- iv. Section 272 – the power to extinguish rights relating to telecom apparatus.
15. A referencing process has been carried out to establish and inform the owners, occupiers, tenants and any other users of the adjacent areas of land which will be affected by the acquisition and extinguishing of rights. The CPO order schedule will include those areas over which new rights will be required as part of the process.

Stopping Up Orders

16. The scheme will also require applications for stopping up orders under Sections 249 and 251 of the TCPA, and this will be required on two existing public paths adjacent to the development. These are shown in Annexe 3.
- a) One of the new shop units will encroach onto the footpath to the east of Sainsbury's in Cambridge Place by approximately 1 metre (Area A). Surrey County Council has confirmed that this is not highways land but it could be argued that the public may have acquired a right of way through prescription. Counsel therefore advises that, for present purposes, this area should be treated as if it were a public right of way.
 - b) Similarly the path which extends from Cambridge Place to Brightwells Road between Sainsbury's car park and the current tennis club land (Area B) will need to be stopped up for the duration of the works to enable construction of the adjacent shop unit.
17. The plan at Annexe 3A shows the hoarding line during the construction period. Section 251 of the TCPA authorises the Secretary of State to make an order to extinguish any right of way over land which has been acquired or appropriated for planning purposes. He must be satisfied either that an alternative right of way has been or will be provided, or that the provision of an alternative right of way is not required. In the case of the right of way at Cambridge Place (Area A), no alternative right of way will be required, as the remaining part of the footpath will continue to be accessible. In the case of the footpath to the East of Sainsbury's car park (Area B) the alternative will be to Brightwells Road via South Street.
18. Regulation 15 of the Town and Country Planning General Regulations 1992 allows the Secretary of State to run this procedure concurrently with the statutory procedure for the confirmation of the proposed CPO.

Financial Analysis - Background

Site Assembly

19. Members will be aware that the Council has already secured the release of the restrictive covenant over the Dogflud Car Park and has purchased the freehold of the former Health Centre. Under the Development Agreement the Council/CNS need to acquire the Marlborough Head and the former Regal Cinema site. The estimated cost of this is reflected in the Development

Agreement with adjustments to the premium due to the Council depending on who purchases the two sites.

20. The procedure for calculating compensation for compulsory purchase is summarised in paragraph 22 below.
21. When the Council granted landowner sanction for the Brightwells Development in December 2007 the financial model made provision for the acquisition of land not in its ownership or control. To date the Council has purchased the freehold of the Health Centre and released the Surrey County Council restrictive covenant applying to part of the site. Acquisition with associated costs is required of the former Regal Cinema site and the Marlborough Head Public House, together with Stamp Duty Land Tax (SDLT) and Waverley's agreed share of the costs of using Compulsory Purchase powers.
22. The owners of lands which are compulsorily purchased are entitled to receive land compensation. The land compensation payable to each dispossessed land owner is subject to determination by the Lands Chamber of the Upper Tribunal (formerly known as the Lands Tribunal) in the absence of agreement between the parties. In simple terms, each dispossessed land owner is entitled to receive the open market value of his estate or interest as at the valuation date (normally the date of entry onto his land), there being left out of account any increase or decrease in that value which is solely due to the presence of the CPO scheme/proposed development.
23. At this stage in the process, it is difficult accurately to assess what valuation would be placed on the sites. Market conditions at the valuation date will determine the figure. The current estimate of the overall land compensation budget (excluding professional costs and tribunal fees) is shown in (Exempt) Annexe 4.
24. The Development Agreement with CNS allows for either the Council or CNS to purchase the required sites. However, only a local authority can action a CPO. Therefore, if the CPO is successfully completed, it will be Waverley who will acquire the sites, with financial provisions in the Development Agreement specifically allowing for this i.e. the financial premium the Council receives when the Development Agreement becomes unconditional will be higher, to compensate the Council for this additional expenditure.

CPO/Professional costs

25. Each case can vary quite significantly and will also depend on how much internal resource can be utilised. It is considered that a significant amount of the work leading up to any Inquiry will involve internal staff resources that are already budgeted for. However, as at March 2012 the estimated maximum cost of undertaking a CPO is £200,000, including Upper Tribunal fees. The provision included in the Council's budget for 2012/3 is £100,000. Costs will be substantially less if any early private treaty sale is agreed. Details of the estimated costs are set out in (Exempt) Annexe 5.

26. Given that CNS will be indemnifying Waverley for half the costs of obtaining a successful CPO, it is estimated that the Council will finance its share of professional costs, £100,000, from the provision allowed for site assembly. The Council's share of these costs will be met from the eventual capital receipt. Budget provision has been included in the 2012/13 Capital Programme. The acquisition costs of both sites will be met from the eventual capital receipt.

Viability

27. Members will be aware that one of the main pre-conditions in the Development Agreement with CNS is a viability test. There is also a provision which allows the developer to waive this condition in which instance the Council would receive up-front the Minimum Land Value while CNS would absorb the risk of the required profit levels not materialising.
28. The latest viability report prepared by CNS, summarised at (Exempt) Annexe 6, demonstrates that after a period of economic recession there has been an improvement in trading conditions in both residential and commercial markets whereby a positive return on the scheme is forecast. The estimates included at (Exempt) Annexe 6 have been prepared using relevant expertise as follows:

Residential Values	Hamptons and Savills
Commercial rent levels	DTZ and CBRE
Building costs	EC Harris
Land Valuations	GL Hearn and Christies

Funding Advice

29. DTZ are an international firm of real estate advisors who have been working alongside Crest Nicholson on the East Street project to advise on financial viability, funding advice and provide information and advice on the retail and commercial markets. A letter at Annexe 7 from DTZ (previously included in the report to the Executive on 29 November 2011) sets out their view on funding criteria and their assessment of how Farnham compares to this. It also gives an update on their progress in marketing the project to potential funders, and explains the importance of the CPO in the process.

Risk Assessment

30. **Objections to the CPO lead to a public inquiry** - The programme set out at paragraph 9 in this report allows time for such an inquiry. That aspect of the procedure is under the management and direction of the Secretary of State as confirming authority.
31. **The landowner(s) agree to sell the land well into the CPO process** - In this situation the Council would have incurred the abortive CPO costs up to that point, but conversely would achieve earlier acquisition and residual CPO cost savings. Further, the prospect of CPO and the Council's ability to refer a dispute on land compensation to the Upper Tribunal would provide the Council with a secure negotiating position on price.

32. **The CPO is not confirmed by the Secretary of State** - The justification for the CPO satisfies the provisions of section 226 of the TCPA and complies with Government guidance in Circular 06/04. However, the ultimate decision remains with the Secretary of State. In the event that the CPO is not confirmed and it is consequently not possible to secure the necessary land acquisitions, it will not be possible to deliver the scheme in its present form. In addition to the CPO costs incurred by Waverley it is likely that the Council/CNS would be required to pay the CPO costs of the affected landowners. Those costs could be of a similar order to Waverley's/CNS's. If this happens the costs will need to be met from existing capital programme resources. The Council has received advice from senior Counsel and believes that the grounds for CPO can be justified.
33. **Development does not proceed after CPO has been made and confirmed** - The Council will be indemnified by CNS for half of any costs incurred for a successful CPO once the Development Agreement becomes unconditional. The Council will be the owner of the land acquired.
34. **Development does not proceed after properties have been compulsorily purchased** - The dispossessed property owners will have the right to (or will have been paid) compensation and CNS will have an ongoing liability to cover part of the Council's costs as referred to above. If, for unforeseen reasons, CNS is unable to proceed, Waverley would have to decide whether to seek an alternative developer. In the unlikely event that the CPO sites have been acquired, but the Brightwells Development does not proceed, the Crichel Down Rules require the Council in certain circumstances to offer the CPO land back to their former owners at their then current open market value. These circumstances would generally apply where the Council wished to dispose of the land.
35. **There are significant delays between site acquisition and the CNS Contract becoming unconditional** – The Council will aim to minimise the period of time between buying the land, funding the Riverside works and receiving its premium, but any delays would need to be covered by bridging finance. Cashflow differences would be temporarily covered by the Council's revenue reserve or from temporary borrowing.
36. **The overall East Street scheme is non-viable for the Council** - In this situation where the Development Agreement has not gone unconditional, CNS could waive the viability clause and pay the Council its premium. If this did not happen there is a risk that the Council could be left holding the land without an immediate scheme. Whilst this would require alternative capital funding and financing costs the Council would be in a stronger position in developing a future scheme.

Other Options

37. The Council has met with the outstanding landowners on many occasions over the years, and did so as recently as March 2012, with a view to securing the sites by private agreement with the property owners. To date, neither party has agreed to sell. It is therefore considered necessary that the scheme is supported by a CPO in order to achieve delivery of the Brightwells

Development, notwithstanding that those efforts to acquire the necessary interests by agreements will continue. For the reasons given in this report and in the annexed proposed Statement of Reasons, there is a compelling case for compulsory purchase of the lands proposed to be acquired in the public interest.

Consultation and Human Rights Act 1998

38. There is a well documented history of consultation over the last 12 years with the public in general and Farnham residents in particular on the Brightwells Regeneration Project since its inception. The Brightwells Development was subject to public consultation through the planning application procedures. Members of the public and representatives of interested organisations have been given the opportunity to make suggestions, ask questions and present their views to members in a range of settings.
39. The Human Rights Act 1998 incorporated into domestic law the European Convention on Human Rights. Public authorities are required to act in accordance with the Convention. The following Convention rights are relevant to the decision to make and proceed with the proposed CPO.
 - i) **Entitlement to a fair and public hearing** in the determination of a person's civil rights (Convention Article 6). This includes interference with a person's property rights and can include opportunities to be heard in the consultation process. Affected landowners, lessees and occupiers have the statutory right to be consulted following the making of a CPO and to make representations to the Secretary of State opposing the making and confirmation of a CPO through the relevant legal procedures. As mentioned above, the CPO may ultimately be decided by the Secretary of State following a public inquiry at which interested parties will have the opportunity to put their case orally or in writing.
 - ii) **Rights to respect for private and family life and home** (Convention Article 8). Under article 8(2), such rights may be restricted to the extent lawful and necessary in a democratic society in the interests (amongst others) of economic well being. The interference must be fair and proportionate in the public interest. It should be noted that the current main freehold owners of the CPO site are commercial organisations. It is well established that, in order to justify compulsory purchase on this basis, the acquiring authority must be able to show a compelling case for acquisition in the public interest.
 - iii) **Peaceful enjoyment of possessions** (First Protocol Article1). This right includes the right to peaceful enjoyment of property and not to be deprived of one's property except and in proportion to the public interest. Again, it is well established that, in order to justify compulsory purchase on this basis, the acquiring authority must be able to show a compelling case for acquisition in the public interest. The right of dispossessed land owners to receive land compensation is relevant to that question.

40. The European Court has recognised that “*regard must be had to the fair balance that has to be struck between the competing interests of the individual and the community as a whole*”. Both public and private interests are to be taken into account in the exercise of the Council’s powers and duties. Any interference with a Convention right must be necessary and proportionate.
41. The Council is therefore required to consider whether its actions would infringe the human rights of anyone affected by the making of the CPO. The Council must carefully consider the balance to be struck between individual rights and the wider public interest. It is considered that any interference with Convention rights caused by the CPO will be justified in order to secure the significant economic, social and environmental benefits that implementing the Brightwells Development will bring in redeveloping a run-down part of Farnham. The benefits have been set out above in this report. The Council is under an obligation carefully to consider whether they do justify the making of a CPO and the interference with private rights such that the benefits of the scheme outweigh the other private interests affected by the CPO.

Conclusion

42. Carrying out the Brightwells Development scheme will realise the Council’s long-standing and established policy objective of regenerating the Brightwells area of Farnham. The CPO is required to facilitate the development, redevelopment and improvement of the Brightwells area. Implementation of the Brightwells Development by means of the planning permission will achieve that objective and both promote and improve the economic, social and environmental well-being of Farnham and the wider locality as required by Section 226 (1A) of the TCPA.

Recommendation

It is recommended that the Executive recommends to Council that:

1. it confirms that it is satisfied that it is necessary to acquire the sites by compulsory purchase as part of the required redevelopment site, in order to carry out the Brightwells Development as proposed and achieve the social economic and environmental benefits outlined in this report;
2. it reaffirms its previous decision for the Council to make a CPO under Section 226 (1) (a) and (3) of the Town and Country Planning Act 1990 for the acquisition of land shown on the plan (attached as Annexe 1) in order to facilitate the carrying out of a scheme of development, redevelopment and improvement at Brightwells/East Street, Farnham (‘the Brightwells Development’);
3. it resolves to exercise its powers under Section 13 of the Local Government (Miscellaneous Provisions) Act 1976 for the creation of new rights required for the purpose of carrying out the Brightwells Development;

4. it resolves to exercise its powers under Sections 236, 237, 271 and 272 of the Town and Country Planning Act 1990 as appropriate in order to extinguish the specific rights in connection with the CPO;
5. it resolves to request the Secretary of State to exercise his powers under Sections 251 and (if necessary) 254(1)(b) of the TCPA in accordance with regulation 15 of the Town and Country Planning General Regulations 1992, to authorise the requisite extinguishment of public rights of way over the lands at Brightwells to be acquired or appropriated for the purposes of the Brightwells Development, as described in paragraph 16 above;
6. the Chief Executive be authorised to take all necessary steps to secure the making, confirmation and implementation of the Compulsory Purchase Order including, but not limited to, finalising the terms of the Statement of Reasons, CPO Order and Schedule of Interests; service of notices and dealing with all other relevant documentation; dealing with valuations; presenting the Council's case at public inquiry; negotiating and entering into agreements or undertakings with landowners; acquisition of third party interests by private treaty and payment of compensation; references to the Lands Chamber of the Upper Tribunal or Court for determination; dealing with any other relevant claims or orders; and
7. the Chief Executive, in consultation with the Portfolio Holder, be authorised to incur the Council's share of the necessary expenditure in obtaining the sites by compulsory purchase and undertaking the CPO procedure to be financed from the 2012/13 Capital Programme pending the receipt of the capital premium.

Background Papers

There are no background papers (as defined by Section 100D (5) of the Local Government Act 1972) relating to this report.

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