

To: All Members of the EXECUTIVE
(And all Members of the Council for
information)

When calling please ask for:

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Date: 16 May 2016

Membership of the Executive

Cllr Brian Adams
Cllr Andrew Bolton
Cllr Kevin Deanus
Cllr Jim Edwards
Cllr Jenny Else

Cllr Carole King
Cllr Ged Hall
Cllr Tom Martin
Cllr Julia Potts

Dear Councillors

A meeting of the EXECUTIVE will be held as follows:

DATE: TUESDAY, 24 MAY 2016

TIME: 5.00 PM

PLACE: COUNCIL CHAMBER, COUNCIL OFFICES, THE BURYS,
GODALMING

The Agenda for the Meeting is set out below.

Yours sincerely

ROBIN TAYLOR
Head of Policy and Governance

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NOTES FOR MEMBERS

Contact Officers are shown at the end of each report and members are welcome to raise questions, make observations etc. in advance of the meeting with the appropriate officer.

AGENDA

1. **APPOINTMENT OF CHAIRMAN**

To confirm the appointment of Councillor Julia Potts as the Chairman of the Executive for the Council Year 2016/17.

2. **APPOINTMENT OF VICE-CHAIRMAN**

To confirm the appointment of Councillor Tom Martin as Vice-Chairman of the Executive for the Council Year 2016/17.

3. **APOLOGIES FOR ABSENCE**

To receive apologies for absence.

4. **DECLARATIONS OF INTERESTS**

To receive from members, declarations of interest in relation to any items included on the agenda for this meeting, in accordance with the Waverley Code of Local Government Conduct.

5. **BRIGHTWELLS REGENERATION SCHEME** (Pages 7 - 90)
(Portfolio Holder: Cllr Julia Potts)
(Wards Affected: All Farnham Wards)

The purpose of this report is to update Members on the significant progress the Council has made on the Brightwells Farnham Regeneration Scheme, including information on the current financial and planning arrangements and the delivery position relating to this key corporate priority.

The Executive is requested to consider the proposed financial and funding arrangements and the consequential variations to the Development Agreement, have regard to legal and financial advice and make recommendations to Council about how to proceed with this scheme.

Recommendation

That the Executive recommends to Council that it agrees to:

1. Receive the Best Consideration report from GVA and note that the financial proposals represent best consideration;
 2. Receive the legal advice from Leading Counsel and the Borough Solicitor regarding the potential for legal challenge and acknowledge the importance of this advice in relation to the decision about proceeding with the amendments to the Development Agreement;
 3. In relation to recommendation 2 above, approve recommendation 1 included in the (Exempt) annexe and delegate authority to the Executive Director and Borough Solicitor in consultation with the Leader of the Council and Portfolio Holder for Finance to negotiate with the developer appropriate measures to provide mitigation against the costs of robustly defending any legal challenge on an equal share basis;
 4. Approve as Landowner, the change of Affordable Housing accommodation mix within the Scheme to 72 Shared Ownership units;
 5. Note Officers' analysis of the financial appraisal and the evaluation of risks included and acknowledge that the financial appraisal is predicated on the approval of the changes to Development Agreement and the Section 106 Agreement as set out in the report;
 6. Delegate authority, in line with Counsel's advice at paragraphs 36 and 37, to the Executive Director and Borough Solicitor to execute the Compulsory Purchase Order in respect of the Marlborough Head Pub in Farnham, the remaining CPO Order Lands set out within the CPO, and all other rights of access and oversailing set out within the CPO;
 7. Approve the changes to the Development Agreement necessary to enable the Scheme to proceed as summarised in paragraph 72 of this report and detailed in the paragraph 9 of the (Exempt) annexe;
 8. Subject to resolution of the issues set out in the (Exempt) Annexe to this report, delegate authority to the Executive Director, Director of Finance and Borough Solicitor in consultation with the Leader of the Council and the Portfolio Holder for Finance to agree the detailed legal terms necessary to achieve an unconditional Development Agreement.
 9. Agree the commercially sensitive recommendation 2 regarding Stamp Duty Land Tax set out in the (Exempt) Annexe to this report
6. EXCLUSION OF PRESS AND PUBLIC

To consider the following recommendation on the motion of the Chairman:-

Recommendation

That, pursuant to Procedure Rule 20, and in accordance with Section 100A(4) of the Local Government Act 1972, the press and public be excluded from the meeting during consideration of the following item(s) on the grounds that it is

likely, in view of the nature of the business to be transacted or the nature of the proceedings, that if members of the public were present during these items, there would be disclosure to them of exempt information (as defined by Section 100I of the Act) of the description specified at the meeting in the revised Part 1 of Schedule 12A to the Local Government Act 1972.

7. ANY OTHER ISSUES TO BE CONSIDERED IN EXEMPT SESSION

To consider matters (if any) relating to aspects of any reports on this agenda which, it is felt, may need to be considered in Exempt session.

**For further information or assistance, please telephone
Emma McQuillan, Democratic Services Manager, on 01483 523351 or
by email at emma.mcquillan@waverley.gov.uk**

WAVERLEY BOROUGH COUNCIL
EXECUTIVE
24 MAY 2016

Title:

Brightwells Regeneration Scheme

[Portfolio Holder: Councillor Julia Potts]
[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 and 5 of Part I of Schedule 12A to the Local Government Act 1972, namely:-

3. Information relating to the financial or business affairs of any particular person (including the authority holding that information).
5. Information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.

Summary and purpose:

The purpose of this report is to update Members on the significant progress the Council has made on the Brightwells Farnham Regeneration Scheme, including information on the current financial and planning arrangements and the delivery position relating to this key corporate priority.

The Executive is requested to consider the proposed financial and funding arrangements and the consequential variations to the Development Agreement, have regard to legal and financial advice and make recommendations to Council about how to proceed with this scheme.

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

This report relates to all 4 of the Council's Corporate Priorities of **Environment, Community Wellbeing, Customer Care** and **Value for Money**.

The Council has a clear priority to regenerate the East Street area of Farnham, which also has an important role to play in delivering an increased supply of affordable housing. The Brightwells development ("the Scheme") would provide 72 new, affordable housing units amongst the total 239 residential units. The provision of shops, restaurants and leisure facilities, including a cinema, would provide attractions for all age groups within the town, and the Scheme also provides

enhanced open space and community facilities in a convenient central location within Farnham Town Centre.

Background

1. The regeneration of the East Street area of Farnham is a longstanding corporate priority for the Council. The opportunities for improving this eastern area of Farnham town centre emerged in the 1990s, 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 significant amount of which was within 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".
3. Following adoption of a planning brief for the East Street Area of Opportunity in February 2000, the Council went to the market to seek expressions of interest in the development opportunity.
 - A total of 25 expressions of interest were received by the Council, and in February 2002 the council's Executive met to determine a shortlist, in accordance with a set of criteria including the credibility of the company and its professional team, the financial strength of the company, their understanding of the planning brief and their commitment to quality throughout the scheme.
 - In September 2002, the Council's Executive considered the detailed development proposals received. All eight invited bidders had submitted proposals, including Crest Nicholson Sainsbury's (CNS). However, one bidder subsequently withdrew, leaving seven bids for consideration by the Council.
 - The detailed evaluation report considered by the Council's Executive on 20 September 2002 showed that on both design and financial grounds, the bid from CNS was the clear front-runner.
 - On 15 October 2002, the Council formally awarded the status of preferred development partner to CNS and resolved to enter into a development Agreement. This agreement was signed on 22 April 2003.
 - The Developer submitted a detailed masterplan to the Council, which was given 'landowner sanction' in July 2004, following a round of public consultation.
4. The Council, as the largest landholder, agreed Landlord's Consent for its preferred scheme in 2007 following a major public consultation exercise where the overwhelming majority of respondents supported the proposed scheme. CNS subsequently prepared and submitted a mixed-use planning application

under reference WA/2008/0279 for the redevelopment of East Street. The Joint Planning Committee resolved to grant planning permission on 1 October 2008 and 29 October 2008 and permission was granted following the completion of a Section 106 Agreement on 6 August 2009.

5. There are four extant planning consents relating to the Scheme, the first three of which replace earlier permissions.
 - WA/2012/0911 – Provision of temporary construction access to the A31, comprising of a bridge across the A31, and other supporting infrastructure. This consent was granted on the 7 August 2012 and was implemented on 3 August 2015
 - WA/2012/0912 – Main Brightwells Scheme – comprising of a mixed-use development including retail, café, cinema, replacement day centre, car park and 239 residential units. This consent was granted on 7 August 2012 and was implemented on 3 August 2015
 - WA/2014/1926 – Listed Building consent for demolition of the Redgrave Theatre and works to the Brightwells House, including extensions and other changes to convert Brightwells House to restaurant use. This consent was granted on 28 January 2015 and expires on 28 January 2018.
 - WA/2014/2420 – Erection of a building to provide a bat roost – granted 20 February 2015. The bat roost will need to be in place prior to any demolition works to any existing buildings on the site.
6. The Developer submitted a further planning application in 3 February 2016 under reference WA/2016/0268 seeking permission for the variation of Condition 3 (plans) and Condition 61 (Sustainability Statement) and removal of Condition 61 (combined heat and power scheme) of WA/2012/0912 (East Street Redevelopment) to allow 106m² increase in size of extension to Brightwells House, realignment of building D21, removal of Gostrey Centre community use from building D20, with the resulting space to be occupied by Use Class A1/A3 Retail/Food and Drink, internal alterations and amendment to landscaping scheme; revision to heating strategy, omitting energy centre and changes to comply with current building regulations and other regulation requirements with subsequent revisions to Sustainability Statement.
7. An application under Section 19 to vary Condition 6 (plan numbers) to allow a variation to the extensions and alterations permitted under Listed Building Consent WA/2014/1926 has been submitted.

Development Details

8. Planning permission WA/2012/0912 authorises a mixed-use development of the East Street area; regenerating an important area of Farnham town centre

which has been left redundant for numerous years. The Scheme brings to Farnham:

- 9,814 sq m of new retail, cafe, restaurant and bar floorspace;
- 239 new residential properties comprising:
 - 167 for private sale [70%]
 - 72 affordable homes [30%]
- A new 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 of which 198 are for public use replacing the number lost by the removal of Dogflud Car Park.
- A refurbished South Street car park with significant investment improving not only the environment but public access from the basement parking area.

Key Features and community benefits of the Scheme

9. The provision of the following elements would create significant benefits not only to Farnham but the Borough as a whole. The Scheme would deliver much-needed housing, including affordable housing, and would revitalise the East Street area of Farnham, in much the same way as the Lion and Lamb Yard development delivered for the West Street area of the town centre.

The key features include:-

- 72 affordable homes ;
- Six-screen cinema;
- new town square with landscaped gardens;
- new shops, restaurants and cafes;
- newly landscaped park, with views and paths to the River Wey;
- upgraded public car parking;
- create an estimated 430 full-time equivalent jobs once completed;
- restoration of the Grade 2 listed Brightwells House;
- part-pedestrianisation of East Street;
- road improvements to aid pedestrian, cycle and vehicular flows;
- upgraded public transport infrastructure;

Additional benefits of the overall scheme:

10. The following benefits have been delivered and would be delivered by virtue of completion of the Scheme:-
- a new 5-court tennis club at Riverside has been completed, including a modern pavilion and facilities, and the Riverside area has been significantly improved;

- supports the provision of a larger and improved Brightwells Gostrey Centre for community use in a more suitable location in Farnham which also avoids disruption to the service during construction.

Financial Implications

11. The detailed financial appraisal is included in the (Exempt) Annexe. The main financial benefits of the Scheme to Waverley Borough Council are:

Capital

- An up-front land payment of £3.19m* for the leasehold interest on a 150-year term and potential overage.
- A capital contribution towards the relocation of the Gostrey Centre.
- Benefits laid out in the Section 106 Agreement equating to in excess of £2m for the community
- Securing improved infrastructure to support the scheme
- Licence income to compensate loss of car park income during construction.

*This figure is the Developer's offer but may change due to the Stamp Duty Land Tax (SDLT) changes announced in the Budget.

Ongoing revenue benefit

- A proportion of the ground rents from the commercial units. The capitalised value of this rental stream to the Council over the lease period is £5.6m.
 - Potential increased car park income.
 - Potential extra retained business rate income.
 - New Homes Bonus
 - Additional council tax revenues
12. The total revenue benefit of the Scheme to Waverley Borough Council once completed is estimated to be between £700,000 and £900,000 per annum. This will benefit Waverley's residents and help protect and improve services.
 13. Crest Nicholson Regeneration Limited ("the Developer") as envisaged would fund the residential element and they have secured Surrey County Council as the funder for the commercial element of the Scheme and the two parties have agreed the necessary legal documentation with a conditional funding agreement.
 14. Throughout the period of the Development Agreement the Council has taken appropriate property and valuation advice. The most pertinent of this advice at this final stage is from GVA Grimley Ltd, giving the 'best consideration' opinion, and the outcome of this assessment is set out in the Financial Considerations section above. Officers have also been discussing the process and governance issues with Waverley's external auditors Grant Thornton.

15. The Council has a statutory duty under Section 123 of the Local Government Act 1972 to achieve best value from land disposals, whether by long lease or freehold. The duty provides that local authorities may dispose of land held by it in any manner it wishes, provided it is not for a consideration "less than the best that can reasonably be obtained" (unless the Secretary of State consents to the disposal). Obtaining the "best consideration" does not necessarily mean the highest amount in cash terms and other factors can be taken into account.
16. Section 123 cases are considered on their specific circumstances and the onus is on local authorities to be able to demonstrate that, in discharging their statutory functions, they have acted properly, rationally and with due regard to their fiduciary duty in order to avoid the risk of challenge. In practice this requires a robust audit trail, including authoritative valuation evidence from suitably qualified experts. The 'best consideration' report specifically considers this Scheme and takes account of the associated planning requirements and Development Agreement constraints and it updates the valuation and financial appraisal to current market levels.
17. The Council has employed the services of a leading international property valuation company GVA Grimley Ltd to provide its independent opinion regarding best consideration. GVA's Best Consideration report is included at the (Exempt) Annexe. GVA has concluded that:
 - the proposed land payment to the Council is appropriate
 - the land payment gives rise to a profit to the developer which is materially less than it is entitled to receive under the current Development Agreement and also materially less than would be considered acceptable by other developers.
18. As previously reported, it has been necessary for the Council to spend a significant amount of money on the scheme to date to assemble the land, provide the new tennis and car parking facilities and seek expert advice as appropriate. Waverley has spent £5.9m on the Brightwells scheme to date. This figure breaks down as follows:
 - Riverside Tennis Club and new car park - £2.0m
 - Land acquisitions - £2.5m
 - Demolition and other site works £0.4m
 - Legal and consultancy costs £0.5m
 - Staff salaries £0.5m
19. This scheme is a long-term regeneration project with a long lease providing an investment return to the Council from the commercial units. The costs incurred to date have been bridge-financed from Waverley's resources. In cash terms, the land payment would reinstate part of the Council's costs and the estimated annual income would recover the full amount within 5 years once completed.
20. The Developer has secured Surrey County Council as the funder for the commercial elements of the Scheme, which is very positive for the development

as they have a very strong financial covenant and their regeneration objectives for the Scheme are aligned with the Council's. Since then, significant progress has been made between the three parties which have been subjected to rigorous testing by Waverley's external advisors prior to submission to Members for consideration.

21. Waverley will retain the freehold of the scheme with Surrey County Council being the leaseholder of the commercial element in the long-term.

Monitoring Officer Advice

22. The Monitoring Officer wants to enable Councillors to have a robust debate on the merits of the decisions in front of the meetings, without running the risk of a challenge to any decision on the grounds of the way Councillors have reached a decision. To help all Councillors with any doubts about Standards matters, the Waverley Code of Conduct, as adopted in 2012 and since reviewed by the Council, incorporated and explained the Localism Act 2011 principles, and makes it clear that where Councillors have agreed a manifesto or political position, or campaigned for or against the Brightwells scheme, this in itself does not amount to predetermination. However, it would be helpful and prudent if all Councillors, if necessary, make it clear that while they may hold views that amount to a very strong predisposition about the scheme in general, they have not predetermined the particular decisions in front of the Executive or Council.
23. All Councillors can help to maintain public confidence in Waverley's decision-making process by following the general principles set out in paragraph 7 (3) of the Code, and by making it clear that all Members at the meetings of the Executive and Council will consider the decisions on the Brightwells scheme with an open mind and on the facts before the meetings. Waverley's Code summarises the decision-making principles set out in the Wednesbury case see paragraph 50, as follows-

'7.3 When making a decision, do consider the matter with an open mind and on the facts before the meeting at which the decision is to be made, listening to the advice of relevant parties, including advice from officers, and taking all relevant information into consideration, remaining objective and making decisions on merit.'

24. If Members follow these principles it will help to resist any possible challenge to the Council's decisions which might allege that some or all Councillors have predetermined the significant decisions in front of the Executive and Council.

Current Planning Position

25. The current planning position is set out above in order to ensure that Members are as informed as possible regarding all aspects of the Scheme's progress. Members are reminded that Planning considerations, including those concerning S106 agreements, are decisions for the Council as Local Planning Authority and not as landowner, and that any decisions made in respect of this report cannot and must not fetter the discretion of Waverley acting as Local

Planning Authority and cannot pre-judge any decisions that it might make, or vice versa.

26. While these are full, extant planning consents, a number of which are now implemented, there are certain key factors which are significant to the Council as Landowner, as follows.

26.1 Day Centre – the approved Scheme includes the provision of a replacement Day Centre on the site. Following extensive consultation with current users of the site, Surrey County Council, Adult Social Care and the Gostrey Management and Trustees, consideration was given to the proposal to relocate the Day Centre to the Memorial Hall site in West Street Farnham. A planning application has been submitted to the Local Planning Authority for the new Day Centre and planning permission was granted on the 27 August 2015. In addition a further planning application under Section 73 of the Town and Country Planning Act 1990 has been submitted by the developer to amend the main Brightwells application to replace the existing day centre with alternative uses. This would also require amendments to the Section 106 Agreement, which currently commits the developer to provide the day centre on site.

26.2 Other minor amendments – at a public Inquiry in July 2013 into the Proposed Extinguishment of Public Rights of Way at East Street, the Developer made a commitment via the Council to submit a non-material amendment (NMA) to the main planning permission. The NMA would amend the plans to slightly alter the position of the one of the proposed buildings on the western site boundary so there is no projection into the footway. Whilst it may have been intended to propose amendments under the NMA route, the Section 73 application is a more appropriate process because the proposed changes are considered to be ‘minor material’. This NMA amendment forms part of the current S73 application which is currently under consideration

26.3. Prior to commencement of the developments the Developer is required by the conditions attached to the planning permissions, and the Section 106 Agreement, to meet a range of pre-commencement conditions. The pre-commencement conditions on both WA/2012/0911 and WA/2012/0912 have been discharged. Most significant is the requirement that, prior to the commencement of the main Scheme, the construction access bridge onto the A31 is completed. The construction of the bridge would also require the Developer to enter into a Section 278 Agreement with Surrey County Council in respect of highway works.

27. In seeking to progress the funding arrangements and deliver a viable scheme, the Developer has indicated that it wishes to make adjustments to the Section 106 Agreement. The current application WA/2016/0268 proposes the following amended Heads of Terms for the revised S.106 agreement

- To remove the combined Heat and Power scheme and provide alternative carbon saving measures

- To remove the requirement for the community use (the new Gostrey Centre) on the site.
- To amend the Affordable Housing mix to 72 shared ownership.

28. These matters will be considered separately and independently by the Joint Planning Committee.

Affordable Housing

29. The Section 106 Agreement requires the provision of 72 affordable dwellings. It was always envisaged that the Developer would deliver these units in partnership with a housing association. At the outset, Waverley's aspiration had been for a mix of 36 social rented homes and 36 shared ownership homes. However, since the Scheme was approved the market has changed to such an extent that it is no longer viable to achieve this mix.

30. Since 2011, housing associations have no longer delivered new homes for social rent, but have been required by the Homes and Communities Agency's (HCA's) grant funding regime to develop new homes for 'Affordable Rent' (80% of open market rent). 'Affordable rent' is less affordable than social rent for households on low incomes and may increase reliance on Housing Benefit for new tenants. In reality, many of the households who have moved into new homes have been fully dependent on Housing Benefit. The roll out of Universal Credit and, in particular the introduction of a £20,000 benefit cap (including housing costs) in local authorities outside London, means that it is becoming increasingly difficult for these households to access homes let on 'affordable rents'.

31. Alongside 'affordable rents', housing associations are also letting their new homes on fixed term tenancies for the period of time a household has a housing need for that home, rather than lifetime tenancies, with the potential impact for tenants to feel they have less of a stake in the local community.

32. Discussions between the Developer, the selected housing association, Thames Valley Housing Association, and the Council have identified that providing rented accommodation is no longer viable in this Scheme in today's market. The proposal is now to deliver 72 affordable shared ownership houses which still delivers a positive housing offer for Waverley's residents. Income levels which will be required to access 'affordable rent' without Housing Benefit are similar to income levels required to access shared ownership. Shared ownership allows local people the opportunity to step on the ladder to own their own property, in line with the Government's objective to increase home ownership, and buy a stake in their local community.

Legal Implications

33. This report refers to the Waverley Borough Council (East Street, Farnham) Compulsory Purchase Order 2012 (CPO), which was confirmed by the Secretary of State in August 2013. The CPO is now beyond the scope of legal challenge and the Council has until 19 September 2016 at the latest to finalise the execution of all, or part, of the CPO.
34. This report also refers to proposed amendments to the Development Agreement entered into between the Council, Crest Nicholson Regeneration Limited and Sainsbury's Supermarkets Limited, which are necessary to deliver the Scheme. The updated Heads of Terms proposed by the Developer would require amendments to the Development Agreement and the required changes are summarised in paragraph 72 with the detailed documents subject to final agreement.
35. The Council has taken comprehensive legal advice in respect of a number of key legal considerations, including specialist legal advice from its internal and external solicitors in relation to the property transaction elements of the Development Agreement, the details of which are set out below and with certain confidential legal advice included in the (Exempt) Annexe.

The Compulsory Purchase Order

36. The Council has taken advice from Leading Counsel regarding the timing of the execution of the CPO. As identified above, the CPO must be executed by no later than 19 September 2016, failing which the CPO would 'expire' and the Council would need to obtain a new Order. This would clearly not be a route that the Council would wish to pursue.
37. The legal avenue that the Council wishes to pursue in order to execute the CPO must be commenced by no later than 17 July 2016 in order to allow for sufficient time to elapse prior to the 19 September 2016 deadline. This report therefore seeks a delegation to Officers in order to enable them to proceed on this basis.

Procurement Law Implications

38. In addition, the Council has sought specialist legal advice from its internal and external solicitors, and from Leading Counsel, in respect of any procurement law implications relating to any decision to authorise changes to the Development Agreement that are required to deliver the Scheme.
39. In some circumstances, changes to an existing contract may be sufficiently significant that they in effect amount to a new contract, and so cannot be made simply by way of contractual variation, without undertaking a new procurement process.
40. The Council has received detailed legal advice, the content of which is privileged and confidential. A summary of that advice will be provided to all

Members on a privileged and confidential basis. The purpose of this section of the report is to explain in outline (and without waiving privilege on the detailed legal advice) the basis upon which the Council may decide to proceed with the proposed changes, if Members decide that it is appropriate to do so.

41. In procurement law terms, the Development Agreement is likely to be regarded as a 'works concession'. It was originally concluded with the Developer following an advertisement and competition. Although there are now specific rules in force which govern the modification of public contracts and concessions during their term, there are a number of reasons why it is unlikely that these new rules apply in the present case. Rather, it is likely to be necessary to apply earlier case law to determine the significance of the changes. Although that case law is, in relevant respects, similar to the specific legislative rules, it is not identical. In particular, it may more readily require or permit an overall assessment of the significance of the changes in the context of the particular contract.
42. An important question in the present case, whether it is the new rules or the old case law which applies, is whether the changes would result in the "economic balance" of the contract being changed in favour of the Developer. It may be argued that this is the case, because the effect of the changes is that the Developer will be able to proceed with the Development Agreement without the Council receiving the Minimum Land Value for which the Development Agreement previously provided. However, there are also arguments the other way. In particular, it is to be noted that building out the Scheme in accordance with the proposed new terms will result in less profit for the Developer than would have been the case under the Developer Agreement as it was originally concluded in 2003, and that the Developer would not achieve the rate of return provided for by the Development Agreement as it currently stands. It is also to be noted that the Development Agreement as it now stands does provide for the Council to be able to waive the right to receive the Minimum Land Value, and that such a waiver might be anticipated in circumstances where, as here, the Council's overall financial interests are likely to be better served by such a waiver than by continuing to insist upon a Minimum Land Value in circumstances where that is likely to be mean simply that the Agreement does not become unconditional. Finally, consideration of the reports on the evaluation of the original tenders suggests that no account was taken of the minimum amounts (if any) then being offered by the bidders, as opposed to the total premium and rental that their schemes as then proposed were expected to generate on the financial terms being offered.
43. If the proposed changes would not impermissibly shift the economic balance of the Development Agreement in favour of the Developer, then it is not considered likely that there is anything else about the proposed changes that would trigger the need for a new procurement.
44. The correct approach to the issue of economic balance and its implications in a case such as this is not straightforward, and there is limited guidance to be obtained from existing case law. If it was clear that to amend the Agreement as proposed would be unlawful, the Council evidently could not and would not

seek to act in that way. However, in circumstances of legal uncertainty, it would not be improper for the Council to proceed with the changes, accepting in doing so that there is a legal risk involved, and recognising that in the event of legal challenge by a person having the appropriate standing in the matter, it would be a matter for the courts to determine the position authoritatively.

45. In deciding whether it is appropriate to proceed on this basis, Members will need to weigh up matters including: their views of the desirability or otherwise of the development proceeding on the proposed terms (as discussed elsewhere in this report); what the alternatives might be, including the likelihood or otherwise that a new procurement process would in fact lead to any improved proposals; and the likelihood of any legal challenge and the consequences if it were to succeed.
46. So far as any such challenge is concerned, another party who would have wished to compete for a new contract would be entitled to bring a claim against the Council under the procurement legislation, contending that there should have been a new procurement. The current assessment is that it is unlikely that any rival developer would be interested in pursuing such a challenge, although the possibility cannot be ruled out. It is also possible that some other person, perhaps an objector to the form of the proposed development, might bring a claim for judicial review, and seek to have the Council's decision to agree to the variations quashed. Such a claim is more likely to materialise in practice, but there is a strong argument that objectors would not have the necessary standing to make such a claim.
47. If the Council does decide to agree to the variations, it is recommended that it should make its intentions clear, so that any person who does wish to make a legal challenge has the opportunity to do so, before the Development Agreement is in fact varied. If the challenge failed, the Scheme would be able to proceed on the revised terms. If it succeeded, then the Council would not be able to make those variations, but it would be in no worse a position than is currently the case, save for the legal costs that would obviously be incurred. Those costs would be significant, but Members may consider that to be an acceptable risk given the importance of the development.

Additional Legal Considerations

48. Judicial Review is the principal mechanism used by the courts to oversee the exercise of public law functions. It seeks to ensure that bodies exercising public law functions act lawfully and fairly and use their powers appropriately.
49. It is important to be aware that judicial review is not concerned with the merits of decisions, but rather it focuses on the process by which decisions were made and actions taken; judicial review is not confined to reviewing the decisions of public bodies. Any party exercising a "public function" may be subject to judicial review proceedings; and judicial review is a remedy of last resort. It is only available where all alternative avenues of challenge or appeal have been exhausted.

50. The leading case that identifies the standard of unreasonableness in public body decision-making that would render a decision liable to be quashed by the courts by judicial review is *Associated Provincial Picture Houses Ltd v Wednesbury* [1948] 1 KB 223. In that case the Court of Appeal held that it could not intervene to overturn the decision of the defendant corporation simply because the court disagreed with the decision. To have the right to intervene, the court would have to form the conclusion that:
- The public body, in making its decision, took into account factors that ought not to have been taken into account, or
 - The public body failed to take into account factors that ought to have been taken into account, or
 - The decision was so unreasonable that no reasonable authority would ever consider imposing it.
51. The test laid down in this case is known as "the Wednesbury test". The term "Wednesbury unreasonableness" is used to describe the third limb, in that a decision would be so unreasonable that no reasonable public authority could have decided that way.
52. Judicial review of local authority property transactions has become more common in recent years with some high profile cases setting new precedents and case law. In the event that a judicial review was requested, the Council, in conjunction with the developer would consider the details of the request and, if necessary would combine efforts and resources to robustly defend the decision to proceed. The Council would seek to agree appropriate indemnities with the Developer to share the costs associated with a Judicial Review.
53. Officers have a duty to advise Members appropriately in light of any risks that might be attached to the making of a particular decision, and Members have a duty to consider that advice as part of their decision making.

Development Agreement

54. The Longstop Date within the Development Agreement has expired. The Council or the Developer can therefore terminate the Development Agreement at any time before the Development Agreement becomes unconditional. The Development Agreement becomes unconditional when the 'conditions precedent' contained within the Development Agreement are all fulfilled (see paragraphs 32 onwards below).
55. The Council is able (under clause 3.6.8 of the Development Agreement) to waive the requirement for a Land Value that is greater than the Minimum Land Value. Crest may waive any of the conditions precedent with the prior written consent of the Council. That consent is not to be unreasonably withheld. If the Council decides not to waive the requirement for the Minimum Land Value to be at the level specified in the Development Agreement, it would need to be certain of being able to argue that its refusal to waive was reasonable in the

circumstances, particularly if the proposed land payment had been considered appropriate in the Best Consideration report.

56. Should the Council decide to terminate, the Development Agreement states that neither party shall have a claim against the other for compensation, costs or expenses, subject to any pre-existing claims or rights of action by either party for breach of the Agreement. There are no such claims between the parties.

Update on Development Agreement conditions precedent

57. The 'Site Assembly' condition is detailed below, together with other Conditions Precedent that must be fulfilled before the Development Agreement can become an unconditional contract and the development can proceed.

58. Planning Condition – CNS to fulfil

The grant of a satisfactory Planning Permission prior to the unconditional date. This includes completion of the Section 106 Agreement. (Fulfilled). Members should note that the fulfilment of this condition is not affected by the submission by the Developer of application WA/2016/0268 referred to in paragraph 6 above.

59. Road Closure Condition – Council and CNS

Discharged when all necessary road closure consents are obtained sufficient to fulfil this condition, and the consents are beyond legal challenge. (Not fulfilled but are not anticipated to present particular issues).

60. Funding Condition – Council and CNS

Completed when CNS has completed a funding agreement with an acceptable funder in accordance with the Development Agreement, and provided to the Council evidence that it has funding sufficient to meet CNS's financial obligations and such arrangements demonstrate to the satisfaction of the Council that sufficient finance will become available to the Developer to meet those obligations. (Not yet complete but a conditional funding agreement has been agreed).

61. Viability Condition

A financial appraisal, agreed or determined in accordance with the Development Agreement, showing a gross return to CNS as set out in the Development Agreement; a land value greater than the Minimum Land Value ("MLV"); a development which in the market conditions of the time would in the reasonable opinion of a reasonable private sector developer be commercially prudent and feasible having regard to the timing of both the payment of agreed expenses and the receipts to be received by the Developer. **(Not yet fulfilled)** The Developer would need to waive the viability condition and accept a lower profit amount than it is entitled to and Waverley Borough Council would need to

accept a Land Value lower than the MLV – these changes are set out in this report.

The Site Assembly Condition

62. The Development Agreement requires that the following take place in order for the development site to be 'assembled':
 - (i) The acquisition by the Council, by private purchase or under a Compulsory Purchase Order, of the former Regal Cinema site, the Marlborough Head public house site and the former Health Centre site.
 - (ii) The Council securing from Surrey County Council the release of a restrictive covenant in respect of Dogflud Car Park.
 - (iii) The Council securing vacant possession of the [now formerly-] existing tennis courts.
 - (iv) The Council obtaining the agreement of the Gostrey Centre to relocation elsewhere in reasonable proximity to the town centre.
63. The former Regal Cinema site was purchased by the Council in early 2013.
64. A Compulsory Purchase Order (CPO) has been secured by the Council for the Marlborough Head site and three further small parcels of land around the north and north-west of the development site. The CPO also covers the acquisition of access rights for hoarding and crane oversailing rights. The Council has until 19 September 2016 to execute any part of the CPO.
65. The Council has secured the release of the restrictive covenant over the Dogflud Car Park, and it has also purchased the freehold of the former Health Centre and demolished it.
66. The Council has overseen and fully funded the construction of five new tennis courts with a state of the art pavilion at Riverside for the new home of Brightwell Tennis Club, which were completed in 1 June 2015. These works also included the creation of a new Riverside Car Park, with the provision of 200 temporary car parking spaces designed to address the need for spaces upon the temporary closure of Dogflud Car Park during the construction of the main Brightwells Scheme.

Brightwells Gostrey Centre

67. At its meeting in February 2015 the Council agreed to relocate the new Brightwells Gostrey Centre from within the Scheme to a more favourable location, both for Trustees and Waverley, to the proposed new multi-purpose community centre on the Memorial Hall site on West Street. Waverley has committed to construct an enhanced centre fit for the future.

68. On 27 August 2015 planning permission was granted for extensions to the Memorial Hall WA/2015/1146. As a result of the Council's decision the future of two key community facilities, The Memorial Hall and the Gostrey Centre, would be secured. It also ensures that disruption to Gostrey Centre users and operators would be minimised during the construction of the main Scheme.
69. The removal of the Day Centre from within the main Scheme creates opportunities for further commercial elements to be introduced adding to its viability. The financial appraisal from the Developer has proposed a payment towards this enhanced provision to contribute to the cost of providing the Centre within the Scheme.

Economic Conditions

70. The Development Agreement was updated, drafted and signed by the Developer and Waverley in 2009. Since that time, mainly due to a long recession, the property market and what is deliverable by residential and commercial developers and funders has changed significantly and this is confirmed by GVA in their report. This means that if the Council still wishes to deliver the approved Brightwells scheme, it would need to be flexible with a number of the detailed terms and conditions included in the original Development Agreement, and the required changes are set out in this report.
71. To deliver the Scheme, the Council would also have to accept that the value of 'best consideration' now equates to a significantly lower capital payment than was envisaged in the Development Agreement. The Developer would also have to accept higher risk and lower profit amount than envisaged. There is significant interest in the commercial elements of this Scheme which is demonstrated by the number and strength of the sign-ups from leading companies including cinema, major food retailer and a number of restaurants. This is referred to in the financial implications section of the reports.

Required changes to Development Agreement

72. In order to deliver the scheme on the terms set out in this report, the Council will need to approve the following amendments to the Development Agreement:
 - (i) that the Council waives its requirement to a Land Value greater than the minimum Land Value of £8.76m and accepts a land payment of £3.19m*
 - (ii) that the Developer self-builds the commercial elements of the Scheme. The Development Agreement currently allows this to happen in respect of the residential elements of the Scheme, with an open competitive tender process required for the residential build contract. The Development Agreement therefore needs to be amended in order to allow for Crest Nicholson to self-build the commercial, as well as the residential, elements of the Scheme – see risk section for more details.
 - (iii) the introduction of a service charge for the structural element of the public car park building in exchange for a fixed payment of £300,000.

*This figure is the Developer's offer but may change due to the Stamp Duty Land Tax (SDLT) changes announced in the Budget.

73. The list above is a summary of the material changes to the Development Agreement. Other minor changes are required and the full set of changes to the legal documents are set out in the Exempt Annexe.

Analysis of Key Risks

74. Any project of this scale and complexity has risks associated with it. The table below identifies the key legal, financial and contractual considerations and describes the mitigation in place or proposed.

Risk	Mitigating Actions
The external expert legal advice suggests that there is a significant risk of legal challenge to the Council's decision-making in respect of the Brightwells proposals	<ul style="list-style-type: none"> - Leading Counsel has advised that this is a proper way for the Council to proceed. - Transparent reporting - Agreement to be sought to take joint action with the Developer and share costs of robustly defending challenge - The outputs of the proposed scheme are the same as those required in the Development Agreement. - Given the major community and regeneration benefits and significant revenue stream to be achieved from delivering this scheme, Waverley would take joint action with the Developer to robustly defend any claim.
If a Judicial Review challenge was to be launched it could damage the Council's reputation and incur costs and/or cause delays. Given the interest shown from some people in the local community in exploring such action to date, there is a high likelihood of the Council needing to defend a challenge.	As above
The CPO must be executed by 19 September 2016. This requires a Council decision on whether to	<ul style="list-style-type: none"> - Decision scheduled for 24 May - Counsel advice taken in relation to CPO timing

<p>progress with achieving an unconditional contract in May 2016. Failure to achieve the CPO deadline would prevent the land assembly condition from being implemented and therefore would place a major risk on the delivery of the whole scheme.</p>	<ul style="list-style-type: none"> - Developer has mitigated risk with anchor tenants - WBC would initiate this as soon as possible following a Council decision.
<p>If the Scheme as proposed does not proceed, Waverley would lose the costs incurred to date and loses the opportunity to achieve a significant revenue income</p>	<p>The Council still retains the freehold title for the majority of the site. Whilst it could not action the CPO, the Council could dispose of the site to maximise financial return and generate a significant capital receipt.</p>
<p>The construction bridge will need to be completed prior to work commencing on the main site to meet the Council's expectation that construction traffic will access the development site from the A31.</p>	<p>The Council has and will continue to work with the developer to ensure that all planning conditions are met.</p>
<p>The financial appraisal assumes a number of important changes to the Development Agreement – these would need Council approval as landowner – risk of failure to achieve approval.</p>	<p>The Council can decide not to agree to move forward on the terms proposed. The Developer could challenge the Council if it has acted unreasonably. Therefore, it is important to take appropriate advice at key stages to protect the Council's position.</p>
<p>The financial appraisal assumes changes to the S106 Agreement including moving the Gostrey centre from the Scheme and providing alternative CHP proposals – these need Local Planning Authority approval – risk of failure to achieve approval.</p>	<p>If the Planning Authority as the independent decision maker in these matters does not approve the required changes, this would impact on the viability and deliverability of the Brightwells scheme.</p>
<p>If the Scheme doesn't proceed, there are significant implications of loss of affordable homes in the Borough.</p>	<p>Any replacement scheme on the site would need to meet planning requirements for affordable homes. Whilst the number and timing are uncertain, there would be some level of provision.</p>
<p>If Thames Valley Housing Association withdraw their interest for the 72 affordable homes or fail to reach the</p>	<p>The Developer and Thames Valley HA have provided assurances that the purchase is agreed.</p>

<p>required purchase price this would severely impact on the deliverability of the Scheme.</p>	
<p>Cost inflation could exceed the Developer's estimate and impact on any future overage calculation.</p>	<p>The developer carries the risk of cost inflation once the contract is unconditional and the land payment is agreed. Whilst costs can increase, so can sales revenues. Both would impact on overage. Overage has not been taken into account in the financial appraisal or the 'Best Consideration' report. The Developer is required to be open and transparent in the final financial analysis.</p>
<p>The Council needs to be satisfied that giving agreement for Crest Nicholson to self-build the commercial elements of the Scheme will deliver good value for money and a high quality build</p>	<p>Waverley will use its dedicated monitoring surveyor to review process and costs. Crest have provided the following assurance <i>'Currently Crest has 50 developments on site with an annual build spend of £479.8m 49 of these are direct build. Crest tender all sub-contract works and charge no overhead and profit on the build and use no Crest Group companies to undertake the work. The largest part of this development and construction work is specialist basement construction (where we employ two or three expert major sub-contractors) and residential, where we have Group framework suppliers pursuant to annual or biannual tenders. We buy core components much more cheaply than main contractors and our projects benefit significantly from the continuity of supply from scheme to scheme. We will however be able to demonstrate a value for money supply chain and a sub-contract tender process which both the HCA and partner Councils have relied on'</i>.</p>

75. The risk assessment sets out the key risks associated with this project at this time. Some risks are subject to ongoing mitigation measures being developed by the three parties and do not pose a major threat to the delivery of the scheme or the validity of the decision making process.

Potential Alternatives

76. In considering the proposals set out in this report, members should be aware of the potential alternative options for its East Street property asset holding in Farnham. However, given that the current proposals have been assessed as giving best consideration, the Council would have to act reasonably and have sound justification for not proceeding. Significant expenditure has been incurred to date and if the Council decides that it does not wish to progress with the current scheme proposals, it would have to consider how and when this cost would be recovered with any alternative scheme. The first step in any alternative would be to update the Planning Brief. The options once this has been completed could be:
- freehold market sale with a developer with the Council maximising value from the site, within planning constraints;
 - as above but on a leasehold market sale;
 - another Council-developed scheme with regeneration objectives;
 - joint venture; or
 - restructure the existing Scheme, separating ownership and funding of the commercial and residential elements.
77. Each of these options would take significantly longer to execute than the current Scheme and the Council may decide to secure the best financial return for the Council from its asset with a market disposal rather than continuing to be a development partner and pursuing the objective of regenerating the East Street area of Farnham. These options would also not allow the current CPO to be executed.

Equality Impact Assessment

78. An Equality Impact Assessment has been carried out to consider the impact of the Scheme on the protected characteristic groups. Improvements in the street scene and in particular footpath surfacing would have a positive impact for people with physical disabilities and long-term health impairment. There are likely to be positive impacts on all groups as a result of the improved facilities and specifically older people and younger people would benefit from better leisure and recreational services and improvements to day centre provision. The change in the housing tenure mix was also considered. This has a potentially negative impact on those on the housing register. However, for the reasons set out clearly above the Council has attempted to mitigate the affects of these changes, but due to the housing market and Government policy it has not been possible to retain a mix of social rented property originally anticipated. It was also considered that other opportunities in Farnham and the surrounding areas for social rented property do exist and would be available in the future including those provided by the Council.

Conclusion

79. The Council's aspiration to regenerate the East Street area of Farnham remains a key corporate priority. The Brightwells Scheme would bring much needed vibrancy and employment to a currently underused area of land in the centre of Farnham. The scheme also contributes significantly to the housing numbers required of the Council including a large number of affordable homes. The development would regenerate an important site in central Farnham and would bring major community benefits to residents, visitors and local businesses. The Council would receive a capital payment and a significant package of revenue income gains including commercial rental income. Leading property and valuation advisors GVA have confirmed that the financial proposal meets the requirement for the Council to achieve best consideration from the disposal of an asset.
80. Major progress has been made by the Council to fulfil its aspiration to deliver this key corporate project including purchasing almost all of the necessary land, obtaining a confirmed CPO from the Secretary of State, and providing new tennis facilities and car parking spaces to compensate for the loss of Dogflud Car Park during the construction phase of the Scheme.
81. The site assembly requirements for the Scheme are now nearing completion, and the CPO for the Marlborough Head site could be executed before 19 September 2016.
82. The Scheme would deliver additional retail, restaurant and café floorspace, 239 new homes, including 72 affordable units, a cinema, and landscaped public open space. This scheme would develop the early evening economy in Farnham town centre, create over 400 permanent new jobs, and would help rebalance the draw of Guildford. In addition significant revenue financial benefits would be created for the benefit of Waverley's residents.
83. Securing Surrey County Council as the funder of the commercial elements is extremely positive for the development as they have a very strong financial covenant and their regeneration objectives are aligned with Waverley's.
84. Changes to the Development Agreement are required to enable the Scheme to progress. As set out in this report, the Development Agreement was drafted and signed by the Developer and Waverley in 2003 with the latest amendments agreed in 2009. Since that time, the property market and what is deliverable by residential and commercial developers and funders has changed significantly. This means that if the Council still wishes to deliver the approved Brightwells scheme, it will need to be flexible with a number of the detailed terms and conditions included in the Development Agreement. The Council will also need to accept that best consideration now equates to a significantly lower capital payment than was envisaged in the Development Agreement. However, the total revenue stream to the Council is significant and provides an estimated cash payback on its development costs of 5years. In addition the Developer would also have to accept an increased risk and lower profit amount than envisaged.

Recommendations

That the Executive recommends to Council that it agrees to:

1. receive the Best Consideration report from GVA and note that the financial proposals represent best consideration;
2. receive the legal advice from Leading Counsel and the Borough Solicitor regarding the potential for legal challenge and acknowledge the importance of this advice in relation to the decision about proceeding with the amendments to the Development Agreement;
3. in relation to recommendation 2 above, approve recommendation 1 included in the (Exempt) annexe and delegate authority to the Executive Director and Borough Solicitor in consultation with the Leader of the Council and Portfolio Holder for Finance to negotiate with the developer appropriate measures to provide mitigation against the costs of robustly defending any legal challenge on an equal share basis;
4. approve as Landowner, the change of Affordable Housing accommodation mix within the Scheme to 72 Shared Ownership units;
5. note Officers' analysis of the financial appraisal and the evaluation of risks included and acknowledge that the financial appraisal is predicated on the approval of the changes to Development Agreement and the Section 106 Agreement as set out in the report;
6. delegate authority, in line with Counsel's advice at paragraphs 36 and 37, to the Executive Director and Borough Solicitor to execute the Compulsory Purchase Order in respect of the Marlborough Head Pub in Farnham, the remaining CPO Order Lands set out within the CPO, and all other rights of access and oversailing set out within the CPO;
7. approve the changes to the Development Agreement necessary to enable the Scheme to proceed as summarised in paragraph 72 of this report and detailed in the paragraph 9 of the (Exempt) annexe;
8. subject to resolution of the issues set out in the (Exempt) Annexe to this report, delegate authority to the Executive Director, Director of Finance and Borough Solicitor in consultation with the Leader of the Council and the Portfolio Holder for Finance to agree the detailed legal terms necessary to achieve an unconditional Development Agreement.

9. agree the commercially sensitive recommendation 2 regarding Stamp Duty Land Tax set out in the (Exempt) Annexe to this report

Background Papers

Development Agreement (as amended)
Compulsory Purchase Order
S106 Agreement

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