

Waverley Borough Council

Report to: Executive

Date: 5 March 2024

Ward(s) affected: Farnham Castle Ward

Report of Director: Dawn Hudd, Strategic Director, Place

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Report Status: Part Exempt

Key Decision: No

Brightwells Yard Development Project

1. Executive Summary

1.1 This report sets out the options available to the Council in response to a request from Crest Nicholson (Crest) to change some aspects of the Development Agreement (DA) the Council has with them for the Brightwells Yard development in Farnham (the Development).

2. Recommendation to Executive

2.1. That the terms of the Brightwells Yard Development Agreement (“the DA” further defined below) are varied as follows:

- i. The ultimate long-stop date for Practical Completion to change from 15 August 2024 to 28 February 2025.

- ii. Developer obligations to deliver the Borelli Bridge (“the Bridge”) be removed from the DA and a separate agreement entered into obliging the developer to deliver the bridge by 31 August 2025.
- iii. That the full and final set of drawings, plans and specifications comprising the Works and agreed between the parties since the Development began, be appended to the Development Agreement thereby superseding the original documents included.
- iv. That the previous form of Car Park Underlease be removed and replaced with a new revised version of the Car Park Underlease which takes account of agreed changes to the service charge provisions which WBC’s officers have in principle agreed.
- v. Authority be delegated to the Strategic Director - Place, to settle the terms upon which these changes will be documented and to authorise execution of any deeds and documents required to give effect to those changes in consultation with the Portfolio Holder for Finance, Assets and Property, the Portfolio Holder for Brightwells and Executive Head of Legal and Democratic Services.

3. Reason(s) for Recommendation:

- 3.1. The developer, Crest Nicholson, has approached the Council and explained that there are certain delivery complications which will mean that they will be unable to deliver the scheme in accordance with the original timeline. They have therefore asked for more time to deliver the scheme. The impact of this will have implications for those businesses who want to invest time and money into the development and this is expanded upon in paragraph 3.3 below. For the reasons below officers consider it to be in the best interests of the Council to agree to delay completion of the scheme.
- 3.2. Crest is committed to (and close to) building out the remainder of the development and have provided a programme of works to indicate the development’s completion.
- 3.3. Tenants under agreements for lease for commercial units at the development need comfort that their lease position is secure, which an extension to the long-stop date will support. Similarly prospective tenants who may be considering taking a unit would also require more certainty. Unless the long-stop date is extended, the Council would have the option to terminate the DA and thereby undermine the leasing structure for the site (and remove Crest as developer). A new long-stop date therefore removes this threat and provide certainty to leaseholders, Crest, the Council and Surrey County Council.
- 3.4. Removing the completion of the Bridge from what is required for the overall Development to reach Practical Completion will allow the scheme to open and

potential tenants to take occupation earlier. This will support the regeneration of the area and bring the development to life.

- 3.5. The tidying up of plans referred to in the DA to allow the most recent and as built drawings to be reflected and allow for a smooth Practical Completion process.
- 3.6. A revised underlease of the car park is envisaged as the car park comes close to completion and opening, that allows the Council to have properly considered the implications of the service charge and running costs and ensure best value for money.

4. Exemption from publication

- 4.1. Part Exempt: The Annexes to the Report contain exempt information, according to the categories set out in the Local Government Act 1972 (amended Schedule 12A).
- 4.2. The exempt content is to be treated as exempt from the Access to Information publication rules because it contains information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.

5. Purpose of Report

- 5.1. To ask Members to note the legal advice received from Sharpe Pritchard LLP regarding requested changes to the Brightwells DA (“SP Legal Advice”) and approve the recommendations to make changes in the form of a Deed of Variation (DoV) to the DA to secure a new long-stop date and allow the opening of the commercial scheme as soon as possible by varying the provisions as to the Bridge Works.
- 5.2. Provide authority for the Strategic Director – Place to deal with how these changes will be documented and to execute those deeds and documents as required.

6. Strategic Priorities

- 6.1. The Project supports the [Corporate Strategy 2020-25](#) priorities of ‘Supporting a strong, resilient local economy’ and ‘Effective strategic planning and development management to meet the needs of our communities’ through regeneration of the site in Farnham.
- 6.2. The Project also supports the [Corporate Strategy 2020-25](#) priority of housing to buy and to rent, for those at all income levels. The development is providing 239 homes and a third are shared ownership with Thames Valley Metropolitan Housing as the Registered Provider.

7. Background

- 7.1 Brightwells Yard is being developed by the Council in partnership with Crest Nicholson, governed by the DA, in order to regenerate land at East Street in Farnham. The Development consists of 239 homes (72 or 30% shared ownership with Metropolitan Thames Valley Housing), 25 commercial units, a 6-screen cinema, a multi-storey car park and landscaped public open space.
- 7.2 The Development is being carried out pursuant to a DA dated 22 April 2003 made between (1) The Council (2) Crest Nicholson Developments Limited (now known as Crest Nicholson Regeneration Limited) ("Crest") and Sainsbury's Supermarkets Ltd and (3) Crest Nicholson Operations Limited ("CNOL") which was subsequently varied on 22 December 2006, 9 September 2008, 6 August 2009, 31 August 2010 and 16 February 2018 ("the Development Agreement").
- 7.3 At the same time as signing the DA, the Council entered into a 150-year Head Lease with Surrey County Council (SCC) for the site. This was granted pursuant to SCC entering into a funding agreement / agreement for lease with Crest whereby SCC became the Funder for the purposes of the DA.
- 7.4 Officers have obtained the SP Legal Advice on the extension of the long-stop date, the removal of the Bridge Works from what is currently required in order to achieve Practical Completion of the Development and advice regarding the updates required to the car park underlease. The SP Legal Advice is annexed at Exempt Annexe 1 (pages 1-5 on the long-stop date and pages 6-8 on the Bridge) and also sets out more background to these issues.
- 7.5 The DA provides for various long stop dates but there is an ultimate long-stop date (or date when all works must be complete) that is 15 August 2024. Crest approached the Council to ask that the Council agree to remove the long-stop date from the DA as potential tenants of the commercial units are concerned about how close this date now is, and that it is understood that not all works will be completed by this date. Having taken legal advice, officers support a new long-stop date being agreed of 28th February 2025. This is on the basis that Crest are nearing completion (currently on site most of the commercial units are complete (save for Brightwells House) and the Cinema is fitted out, complete and was opened on 2nd February 2024) and as outlined at paragraph 3.3 above, this removes uncertainty for all parties.
- 7.6 With regard to the Bridge Works, the Cinema can open due to the terms of its Agreement for Lease with SCC. However, no other commercial units can open until a defined list of works are complete this includes the installation of the new foot Bridge from Borelli Walk into the Development.

- 7.7 The new Bridge has been significantly delayed for a number of reasons, and it does not yet have all the conditions of the original planning permission agreed. Once conditions have been approved by the Local Planning Authority, it will take several months to manufacture and then install. It is anticipated that this will not be in place until November 2024 as long as all planning permissions are agreed in early March.
- 7.8 Crest have asked that the Bridge therefore be removed from the Practical Completion of the Development to allow the commercial units to open before its installation. Officers are agreeable to this on the basis that the Bridge Works still have to be delivered by Crest under the terms of the DA (which shall be further varied) with a new long stop date being set for the Bridge Works.
- 7.9 The new long stop date for the Bridge Works is 31st August 2025.
- 7.10 Financial provision will be in place to support the delivery of the bridge should Crest not deliver within this timeline. Should this take place, the Council would be responsible for delivering the bridge.
- 7.11 The car park underlease has been considered by the Executive Head of Commercial Services and assessed against the proposed service charge arrangements for the scheme. External legal advice has been sought, and as a result the Council will pay a contribution to the wider Brightwells estates costs but will lose the sole responsibility for the Green Wall (that covers 3 of the sides of the car park) that had previously been placed on the Council, reducing the long-term risks and costs associated with the Green Wall.

8. Consultations

- 8.1. Engagement with the Portfolio Holder for Brightwells and the Chair of the Brightwells Programme Board has been carried out who support the proposals to make the changes.
- 8.2. Officers have also engaged with SCC officers to determine whether in principle these requests are supported by SCC as they will also have to make changes to their agreements with Crest Nicholson. We have been informed that in principle they will approve the requested changes, subject to the Council's approval.

9. Key Risks

- 9.1. In considering the key risks for the Council on both issues, Officers have considered the options available. These options and the risks are explored and set out clearly in

the SP Legal Advice note at Exempt Annexe 1 (pages 3&4), and from Crest's perspective in the CMS advice note (Annexe 2) and at section 15 of this paper.

9.2 Re delivery date for the scheme generally - The key risk with regards to the long-stop date is that If the Council were not to enter into a new DoV to provide for a revised long-stop date, interested tenants will not be able to sign their lease agreements and it will delay the scheme opening and could hinder the success of the scheme. Further risk analysis is contained within the appended legal advice at paragraph B.

9.3 Bridge Works

- a) Bridge Risk No1 – by not completing the deed of variation to removing the bridge works from the Practical Completion is that this will have a knock-on impact on the overall opening of the commercial parts of the Development and will delay leases being granted.
- b) Bridge Risk No 2 – by pushing the date for delivery of the bridge to beyond that of the rest of the scheme increases the risk profile around this particular aspect of the development. At this time it is difficult to gauge and so, by way of mitigation, a guarantee in the form of a bond will be put in place at the time these changes are documented. In the absence of developer fulfilling its obligation then the council would be responsible for building the bridge. The [bond] [guarantee] arrangement is intended to ensure that the finances are available in order that the Council has the financial ability to deliver in the event of developer default.

9.4 Car park underlease updates - the risk to not completing these changes is that the Council will be responsible for the Green Wall that covers the car park. The quotes to maintain the green wall are substantive and by allowing the whole of the Brightwells estate to contribute to it, it brings down the cost of the overall liability for the Council.

10. Financial Implications

- 10.1. Allowing uncertainty with regard to the long-stop date and delaying the Development's opening by not supporting these changes to the DA could jeopardise lettings. As the Council shares in the income which SCC receive, such lost lettings / unlet units and delays to leases being granted would have knock on consequences for the Council (the Council retains 5-10% of the commercial income (guaranteed at £100K per annum for the first 2 years)).
- 10.2. In agreeing to any such DoV, the Council have insisted that the Council's legal fees are payable by Crest, which has been agreed.

10.3. The car park underlease updates reduce the councils financial liabilities which will reduce any potential ongoing revenue and capital costs.

11. Legal Implications

11.1. These are set out in the legal advice appended to the Report (exempt).

12. Human Resource Implications

12.1. Development Programme Manager and Asset Manager working with Strategic Director to manage the legal process with external lawyers.

13. Equality and Diversity Implications

13.1 This report has no Equality and Diversity Implications.

14. Climate Change/Sustainability Implications

14.1. This report has no Climate Change / Sustainability Implications.

15. Summary of Options

15.1 Extension of Long Stop date

15.1.1 There are 3 possible options that the Council has in the response to removing the Long-Stop Date:

Option 1	Do not remove the date, and instead initiate the termination process under the DA
Option 2	Do nothing – let the long-stop date come and go with Crest still delivering the scheme
Option 3	Agree to amend the long-stop date (not remove it all together)

Option 1 – Termination - for the reasons set out in the SP Legal advice note, termination of the DA has implications for the Council that are not in the best interests of the Council or the development. It is therefore not recommended that Option 1, to terminate the DA is progressed.

Option 2 - Do nothing – for the reasons set out in the SP Legal advice note this option comes with risks. It creates uncertainty mostly for Crest, SCC and tenants and may jeopardise future lettings which will have knock on effects for the Council's income. For

these reasons this option is not recommended.

Option 3 - Agree to amend the long-stop date (not remove it all together)

Amending the long-stop date in the form of a DoV to the DA gives certainty to Crest, SCC (as head leaseholder) and tenants that the Council will not terminate the DA once the long-stop date has passed. Legal advice confirms that the long-stop date should not be removed all together, but that a new date should be agreed that is appropriate to the completion of the works outstanding.

15.1.2 It is therefore recommended that **Option 3, amending the long-stop date is progressed.**

15.2 Removal of Bridge from Centre Practical Completion

15.2.1 Crest has requested the removal of the Bridge from Practical Completion as it is apparent that all commercial works will be completed considerably sooner than the Bridge installation.

15.2.2 There are two options:

Option 1	The Council do not allow the removal of the Bridge Works from what is required for Practical Completion of the Development
Option 2	The Council (with SCC) allow a change to the DA to remove the Bridge Works from the overall works to allow Practical Completion of the Development to be achieved without the Bridge being completed. The completion of the Bridge would be secured by the delivery of the Bridge Works continuing to be required under the newly varied DA with a new long stop date for these works being imposed, and a financial penalty should it not be achieved.

15.2.3 Option 1 – do not allow removal of the bridge from the rest of the Development - If the Council does not allow this change to the DA, we have been informed by Crest and SCC that the Cinema would be the only commercial trading unit on the Development until the Bridge is in place. This will impact on the overall early success of the Development as it largely remains built out but not filled with commercial tenants. Furthermore, the absence of filled units has created some areas of anti-social behaviour. which is exacerbated by the lack of shops and activity. This option is therefore not recommended.

15.2.4 Option 2 – allow the change so that the Development can open ahead of the Bridge completion. The legal implications for this option have been set out in the SP Advice Note (Annexe 1 at Para. C).

15.2.5 If the Council proceed with this option there must be adequate provision made in the DoV to ensure that the Bridge is delivered. In particular consideration must be given to ensuring that Crest deliver the Bridge in a timely manner. This will be addressed through a new long-stop date with relevant rights to terminate, security under the planning permissions that Crest has obligations to comply with, and the financial surety from Crest that can be passed to the Council for the Council to deliver the bridge itself if the longstop date is not met.

15.3 Update of Car Park underlease

15.3.1 SCC is responsible for the commercial elements of the scheme, and they have employed a managing agent to manage the scheme and be responsible for all shared elements of the scheme, such as external lighting, bins, signage, CCTV etc.

15.3.2 Council officers have met with the appointed agent who has set out the proposed budget for the service charge, officers have been able to analyse this against the following options.

Option 1	The Council retain the existing underlease arrangements which gives full responsibility to the Council for the green wall with significant cost for maintenance to be borne only by the Council.
Option 2	The Council approve the updating of the underlease which allows for the green wall maintenance and costs to be shared amongst the wider commercial estate, as long as the Council contribute to the overall charge.

15.3.3 the risk to the Council is considered to be less when taking the risk with the other commercial tenants as well, and therefore Option 2 is recommended for approval.

16. Conclusion

16.1 Completion of a DoV to the Brightwells Yard DA will allow the commercial part of the development to be opened sooner and all parties will have certainty as to new timescales. Furthermore, it should ensure that no prospective tenants are lost due to any concerns with timescales / the potential termination of the DA. There is anticipated to be little cost (if any) cost to the Council for this as the legal costs for the work to complete the DoV will be met by Crest.

17. Background Papers

17.1 [Report to and Minutes of the Executive Meeting of 24 May 2016](#)

17.2 [Minutes of the Council meeting of 24 May 2016](#)

18. Appendices and Annexes

18.1 Exempt Annexe 1 – Legal Advice Note commissioned by the Council (Sharpe Pritchard) (SP Advice Note)

18.2 Exempt Annexe 2 – CMS Legal Advice from Crest

Please ensure the following service areas have signed off your report. Please complete this box, and do not delete.

Service	Sign off date
Finance / S.151 Officer	23/02/2024
Legal / Governance	16/02/24
HR	23/02/2024
Equalities	23/02/2024
Lead Councillor	24/02/2024
CMB	16/01/2024
Executive Briefing/Liaison	20/02/2024
Committee Services	23/02/2024