

**EXTRAORDINARY COUNCIL**  
**26TH NOVEMBER 2012**

**PRESENT:** Cllrs Mrs Coe (Mayor), Mrs Henwood (Deputy Mayor), Aspinell, Baker, Braid, Carter, Ms Chilvers, Clark, Clarke, Mrs Cornell, Mrs Davies, Ms Golding, Hirst, Mrs Hones, Hossack, Keeble, Kendall, Kerslake, Le-Surf, Lloyd, McCheyne, Mrs McKinlay, Morrissey, Mrs Murphy, Mynott, Dr Naylor, Parker, Mrs Pound, Quirk, Reed, Russell, Sapwell, Sleep, Sparling and Tee.

**APOLOGIES:** Cllr Miss Lewis

**312. MOTION REGARDING THE DEVELOPMENT OF WILLIAM HUNTER WAY:**

Members recalled that at the Ordinary Council meeting which took place on 24th October 2012 a Notice of Motion was put forward for consideration by Councillor Le-Surf.

The motion read as follows:

*"In light of recent speculation regarding the development of William Hunter Way, on behalf of the residents of the borough and in the name of openness and transparency, this council does urgently debate the current situation regarding the development of the site and explores all options open to the council at this time".*

The Motion was duly seconded and was due to be passed to the next meeting of Parking, Borough Project Liaison and Highways Localism Panel on 6th November.

However in accordance with Standing Order number 1.4 a request was made for an extraordinary meeting of the Council to be called to discuss this matter.

In order to strengthen Brentwood's town centre retail and visitor offer, the Council had long held an aspiration to achieve the redevelopment of this surface car park for a high quality, mixed use scheme. The intention had been to provide a cinema, further large retail units and a new multi storey car park supported by a strong pedestrian link between the new development and the High Street.

Following extensive negotiations and deliberations involving developer Stockland/Halladale during 2006 and 2007, the final terms for such a development, including a financial package was approved by the Council on 27 June 2007. The chronology leading to approval of the proposal was set out before Members.

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The Council's advisors (CBRE), in recommending the proposal in September 2007, stated that this was the right scheme for Brentwood, involved minimum risk to the Council and enabled it to retain control. At that stage it was anticipated that the developers would complete the scheme and open for trade by November 2009. The key features of the proposal were that:

- It would deliver a mixed use retail, leisure and residential development including 6 screen cinema, foodstore, retail units and restaurants, 20 flats and 661 spaces in a decked car park
- 66% of the scheme including the cinema and foodstore would be secured through pre-letting agreements before development commenced
- A 150 year lease of the site would be granted by the Council in return for which the Council would receive a share of rents from the new units and the Council would have an option to take a sub-lease of the new decked car park and thereby take over its management.

A formal "Development Agreement" was signed with the developer on 7 December 2007, fixing the principles of the scheme in a binding legal contract.

The key feature of the 2007 legal agreement was that it was conditional, that was to say, it set out a number of detailed matters beyond these agreed matters of principle that would have to be resolved before any development could commence. This legal framework, containing a checklist of preliminary requirements (known as "conditions precedent") was very common with major development schemes. They were required to give both parties the security of a contractual relationship and a defined process against which to justify the time and expenditure (particularly by the developer) of millions of pounds on taking forward the detailed planning and design work necessary for implementation.

The William Hunter Way agreement contained a total of nine "Conditions Precedent". These have had to be worked through since 2007 and while some, for example the grant of planning permission and the undertaking of all necessary site investigations, had long since been concluded, others had not. The developer estimated that it had spent over £2million so far on reaching this stage.

Given this, the complexity of a number of these issues and the effect of the economic recession on the pace of development activity combined with tenant demand nationally, in October 2011, the Council agreed to vary the Development Agreement so as to provide an additional 12 months for the "Longstop Date" (the cutoff date beyond which the whole deal would expire if these conditions could not be met) – until 7 December 2012. However, the Development Agreement provided, if certain conditions precedent continue to be outstanding as at that

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date, then the Longstop Date was automatically extended for a further year thereafter. Because certain Conditions would not be satisfied by 6 December 2012, the Longstop Date would now be postponed until 7 December 2013. The Council was, therefore, bound to the development agreement as it stands until 7 December 2013 and was obliged to carry out its responsibilities under the agreement.

Members had before them a brief overview of the remaining Conditions Precedent and their current status.

Members were advised that, accordingly the Council and the Developer were broadly on course to satisfy its remaining obligations under the Development Agreement. Once the remaining conditions precedent had been met, the Developer was entitled to move ahead with the project in compliance with the other pre commencement conditions as contained in the Development Agreement and attached to the Section 106 Agreement and planning permission. The developer would need to satisfy all such agreements before any physical start on site can be made. The latter included finalising proposals satisfactory to the Council for temporary parking to replace the spaces lost at William Hunter Way and making payments to Essex County Council for transport/highway works.

Now that the final pre-letting of at least required proportion of the commercial elements of the scheme was in imminent prospect, the Developer had been able to undertake a viability check of the project based upon the Heads of Terms agreed in 2007. From this it was clear that due to the current economic climate, there was a gap between the rental levels and capital values anticipated in 2007 as compared to those available in the current market. Although these reductions appear to have been partly offset by a careful review by the Developer of the construction costs and the expectation of a highly competitive market for construction work when this contract was let, there remains in all likelihood a viability gap. The Developer had raised this with the Council and the parties had been considering the question and discussing various possible solutions. These discussions have yet to be brought to a final conclusion.

Members were advised that the Council's original consultants CBRE were again advising on achieving "best value" and reviewing the extent of changes that may be necessary to achieve viability and enable the project to proceed to completion. Their recommendations, along with the recommendations of the parking consultants on the final terms for any sub-lease of the car park, would need to be considered and decisions reached by the Council through due process as advised by the Section 151 Officer and the Monitoring Officer. It should be noted that contrary to concerns that have been expressed regarding a

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conflict of interest for CBRE, it had been verified that there was no conflict and a statement from the Company confirming which was before Members.

Subject to the above and the further matters mentioned below, the developer believes that it may be possible to achieve a start on site by the summer of 2013 with completion of the project in time to achieve Christmas 2014 trading – a vital trading target for the retailers. Any delay to the completion of the outstanding matters could jeopardise this key delivery date and could influence the review of leases with the pre let tenants.

The 2007 Development Agreement, linked in with the Letting Condition, contains provisions that were intended to give the Council the right to take over the management of the new multi storey car park as a sub tenant.

This opportunity was being fully explored with the assistance of a specialist consultant to establish what benefits it might offer but also what risks it might entail. The consultants have been exploring these issues in detail with the Developer and their final report and recommendation was expected shortly.

Whether or not the Council took over the management of the car park would not affect the Council's rental return as a ground landlord for the scheme. Indeed the Developer had, in accordance with the Development Agreement, also been seeking private sector operators to ensure that whatever the outcome of the Council's consideration of the opportunity, the car park would be pre-let to satisfy the Letting Condition. Longstanding legal advice to the Council had been that the Council could not prevent a private operator running the car park as a commercial proposition.

The Developer had proposed an alternative financial package together with some changes to the Development Agreement in order to recast a deal. The Council, therefore, must decide whether it wished to agree to such a recast deal in order to see the development built. At this stage the Heads of Terms remain unchanged.

Members noted that any decision by the Council to change or not change the terms on which it had contracted was a decision, which given the public element of the development, may give rise to the risk of judicial review. It follows, therefore, that any such decision must be made in the light of all the available facts, on the basis of professional opinion and in accordance with due and proper process. It does not follow, however, that the Council was obliged to accept any such recast deal.

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It was not open to the Council to terminate the agreement before 7 December 2013 without exposing itself to a significant claim for damages for breach of contract. The same was true if the Council were to deliberately hold up or delay its duties, under the agreement. It was therefore vital that Members were aware of their responsibility not to expose the Council to such risks and to ensure Major retail developments such as this were complex, protracted and bear legal and financial risk. Problems of one kind or another commonly emerge as the full detail of all the various components of a scheme, be they title, planning, cost estimates or market conditions were developed and tested. Whilst this scheme had been subject to delay it should be emphasised that Brentwood was more fortunate than most other towns and cities around the country which have seen their planned retail schemes having to be scrapped as they were now no longer a viable proposition for the retail market. By contrast, the consented scheme in William Hunter Way remains relevant to Brentwood's needs and was supported by the kind of retailers originally targeted. It was almost ready to proceed.

Over the coming weeks the Council would therefore need to consider two key questions:

- Whether to take the opportunity to accept a sub lease of the new decked car park?
- Whether the any final proposals to vary the original Heads of Terms were acceptable so as to generate facilities for the town?

This decision would be informed by professional advice in considering these matters alongside the advice of the Council's statutory officers. This would be essential to address any major risks. With the development, apart from the risk of over estimating the likely income available, the main risks rest with the developer as the Council would receive a rental income. With Council management of the car park, given its operational nature and the rental which the Council would have to pay, the risks would be largely with the Council.

Members were advised that Officers would continue to work with the developers to secure scheme delivery. Any negotiations would be led by the Council's 3 statutory officers; the Managing Director, The Head of Corporate Finance (Section 151 Officer) and the Head of Legal and Governance/the Monitoring Officer, in consultation with the Leader and Chairman of Parking, Borough Project Liaison and Highway Localism, informed through specialist professionals. On the basis of the professional advice on scheme viability, a recommendation would be made on progression of the proposal. In accordance with Section 151 of the Local Government Act 1972, the Head of Corporate Finance had a statutory duty to ensure there were proper arrangements for the administration of the financial affairs of the Council, and to also ensure through their stewardship role that any decision taken by the Council protects the interests of the public. To

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this end, once the financial terms of the scheme were known these would be fully evaluated and the financial and risk implications identified. The final financial terms may present a variance from those included in the original agreement. Any such revision would be reported, together with the financial implications arising from the new detail, for consideration and approval by Full Council. It would also be important for the Council to fully understand the impact on the medium term financial plan of the Council which the proposals would have, when compared to current budgets. At this time, the full and final details were not available for financial appraisal and the Council remains within the constraints of a legally binding framework. As a result of this, the Council cannot operate beyond these constraints without creating a significant financial and reputational risk to the Council.

The Development Agreement that was entered into in 2007 set out the terms of Agreement on the scheme. Since that time there had been significant change in the economic climate which could impact upon the deliverability of the scheme. Now that the scheme was completing upon the pre let arrangements the rent levels achieved provide the basis for the financial viability to be tested and inform negotiation. Consideration of any proposed variance to the Heads of Terms would be undertaken through the cross party working group (which was originally established through the meeting of Policy Board , June 2006) to comprise the Leader and Deputy Leader, the Chairman of Parking, Borough Project Liaison and Highway Localism, the Leaders of the two Opposition Groups on the Council, the Managing Director, the S151 officer, the Head of Legal and Governance and other officers deemed necessary to inform the meeting. Following consideration, the cross party working group should refer the matter of recommendation to Full Council.

Having considered the detailed report before Members, a full debate took place regarding the proposed development with arguments rehearsed with regard to the provision of information in relation to the project. Members also considered in detail the longstop date and were assured that the date was 7<sup>th</sup> December 2013.

During the debate, Cllr Kendall MOVED an amendment to the Motion, which was not accepted in accordance with Standing Order 11.7.

A further amendment to the motion was MOVED and SECONDED during the debate:

In light of recent speculation regarding the development of William Hunter Way, on behalf of the residents of the borough and in the name of openness and transparency, this council does urgently debate the current situation regarding

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the development of the site and explores all options open to the council at this time and that we continue the debate and bring this back to Full Council in December.

Cllr Le-Surf accepted the amendment to the motion.

Following a full debate, a Member requisitioned pursuant to Standing Order 15.1 that voting on the Motion be recorded.

FOR: Cllrs Aspinell, Carter, Ms Chilvers. Clark, Mrs Davies, Keeble, Kendall. Le-Surf, Lloyd, Morrissey, Quirk and Sapwell. (12)

AGAINST: Cllrs Baker, Braid, Clarke, Mrs Coe, Mrs Cornell, Ms Golding, Mrs Henwood, Hirst, Mrs Hones, Hossack, Kerlake, McCheyne, Mrs McKinlay, Murphy, Dr Naylor, Parker, Mrs Pound, Reed, Russell, Sleep, Sparling and Tee.

The Motion was LOST.

\*[MD-Crowe]\*

(Cllr Mynott declared a prejudicial interest under the Council's Code of Conduct by virtue of owning a property in the vicinity of the development site and left the Chamber taking no further part in the discussion or vote.)

- 313. STANDING ORDER 1.9:** During consideration of the preceding item, the Council having sat for the requisite period RESOLVED to suspend Standing Order 1.9 to enable the transaction for the remaining business on the Agenda.
- 314. MOTION REGARDING THE PARKING, BOROUGH PROJECT LIAISON AND HIGHWAYS LOCALISM PANEL:** Members recalled that at the Ordinary Council meeting which took place on 24<sup>th</sup> October 2012 a Notice of Motion was put forward for consideration by Councillor Kendall.

The motion read as follows:

*"The Members of Brentwood Council call for the Parking, Borough Project Liaison and Highways Localism Panel to be disbanded and all its responsibilities and duties transferred to the Environment Panel with immediate effect".*

The Motion was duly seconded and was due to be passed to the next meeting of Ordinary Council on 19th December 2012 for consideration. However in accordance with Standing Order number 1.4 a request was made for an extraordinary meeting of the Council to be called to discuss this matter.

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Members were aware that the appointment of the Parking, Borough Project Liaison and Highways Localism Panel took place at the Annual Council Meeting which took place on 16th May 2012. This was a part of the appointment of Committees and Panels to deal with the Council's obligations.

During this year the County Council established a revised highways localism arrangement whereby funding was delegated to a panel involving the 4 County Councillors and this Council were given the opportunity to nominate 4 Borough Councillors. This was agreed and was known as the Brentwood Local Highways Panel.

As a result of the formation of this panel the terms of reference of the Borough panel were reviewed and were set out before Members. The Borough Panel had no direct responsibility for highway matters but was set up to influence both the County, the South Essex Parking Partnership and the Local Highways panel, as well as giving opportunities for Borough Councillors and Parish Councils to input into the highways agenda. Apart from this the Borough Panel also had responsibility for management of off- street car parks and projects.

**Process of the meeting cycle**

The Borough Panel meetings had taken place so far on 19th June, 19<sup>th</sup> September and 6th November 2012. There was only one more meeting scheduled to occur which was set for 15th January 2013.

**Governance Review**

As stated earlier in this report there was only one more meeting scheduled for the Parking, Borough Project Liaison and Highways Localism Panel which was set for 15<sup>th</sup> January 2013. Prior to that meeting a report was already due to be submitted to the Ordinary Council meeting on 19th December 2012 which would set out the results of the Governance Working Party (a cross party group looking at Governance options across the whole Council), and this would contain some changes to the way the Council would operate.

The Council would consider proposals put forward and these would include consideration of a new governance regime which would impact on a number of Panels including the Parking panel. It was anticipated that any new regime would come into place in the next municipal year and that the remainder of meetings in this cycle would continue. The last meeting of the Parking Panel in the cycle, if new arrangements were agreed, would effectively be to complete its business with final reports on schemes and to prepare for a handover of its work. It would make sense for that final meeting to take place irrespective of this motion for

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those reasons and to complete its business. This had the sensible benefit of considering governance options as a whole rather than simply looking at one panel now and the remainder as part of the review. In terms of any potential cost saving given that there was only one remaining meeting in the Committee calendar for this meeting it was estimated that the cost saving would be around £1,600.

**The operational effects of any changes**

It was recommended that this decision was deferred and considered together with the Governance review at the Ordinary Council meeting on 19th December 2012 along with other Governance and issues arising. To take any decision in isolation in advance of that report would be to consider one part of the Council's function without regard to the big picture.

If any decision was taken there were a number of operational issues which must be addressed if any decision was taken to disband or restructure the Panel.

- The Brentwood Local Highways Panel would continue without direct agenda input from a supporting Panel
- The Chairman of that Panel would be presumed to continue to be the current Chairman, at least for the remainder of the current year (After that it was for the panel to appoint a chair)
- All business set to come before the meeting needs to be allocated to the most appropriate other Committee, Panel or Board.
- The Terms of Reference need to be allocated to the most appropriate alternate Committee, Panel or Board. Consideration needs to be given the most appropriate alternate for Parking Charges, Management of off street
- Parking, SEPP chairman, Projects. Localism was already included under the Asset Panel. Highways Localism was covered by the Local
- Highways Panel
- Chairmanship of SEPP would need to be the person who Chaired the relevant Committee, Panel or Board taking the Parking remit from the residual Terms of Reference.
- Operational management of Highway's related enquiries. As the Council has already taken a decision that these would be reported direct to the County Council this was not such an issue except on a transitional basis.

Members considered the report before them and some expressed concerns over the Panel and its responsibilities, whilst other Members noted the forthcoming Governance Review may have an effect on all Panels and the way they are run.

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Members then continued the debate, taking into consideration the pros and cons of such a Panel and noted the work the Panel had undertaken since its inception.

Following a full debate, a Member requisitioned pursuant to Standing Order 15.1 that voting on the Motion be recorded.

FOR: Cllrs Aspinell, Cater, Ms Chilvers, Clark, Mrs Davies, Keeble, Kendall, Le-Surf, Lloyd, Morrissey, Mynott, Quirk and Sapwell (13)

AGAIN: Cllrs Baker, Braid, Mrs Coe, Mrs Cornell, Ms Golding, Mrs Henwood, Hirst, Mrs Hones, Hossack, Kerslake, McCheyne, Mrs McKinlay, Mrs Murphy, Dr Naylor, Parker, Mrs Pound, Reed, Russell, Sleep, Sparling and Tee (21)

The Motion was LOST.

\*[MD-Crowe]\*

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