

TELFORD & WREKIN COUNCIL

CABINET - 28 JUNE 2012

CIVIC OFFICES SITE – APPROPRIATION

REPORT OF ASSISTANT DIRECTOR: DEVELOPMENT, BUSINESS & HOUSING

LEAD CABINET MEMBER – CLLR BILL McCLEMENTS

PART A) – SUMMARY REPORT

1. SUMMARY OF MAIN PROPOSALS

To resolve to appropriate the Civic Offices Site for planning purposes to facilitate its redevelopment.

2. RECOMMENDATION

2.1 That Members, having considered representations received, resolve in accordance with section 122(1) Local Government Act 1972 to reaffirm their decision of 29 March 2012 to appropriate for planning purposes the Civic Office Site as identified Appendix 1 because the land is no longer required to be held for office accommodation and associated car parking purposes.

3. SUMMARY IMPACT ASSESSMENT

COMMUNITY IMPACT	Do these proposals contribute to specific Priority Plan objective(s)?	
	Yes	A growing local economy to create jobs.
	Will the proposals impact on specific groups of people?	
	Yes	The appropriation of the Civic Offices Site for planning purposes may affect the enforceability of restrictive covenants neighbouring landowners have the benefit of over the Civic Office Site.
TARGET COMPLETION/ DELIVERY DATE	Appropriation of the Civic Offices Site for planning purposes to be completed early 2013.	
FINANCIAL/VALUE FOR MONEY IMPACT	Yes	Provision has been made for dealing with any claims in accordance with advice received from a QC and external valuer. Ongoing financial support and advice will be provided JAC 240512
LEGAL ISSUES	Yes	The Council has the power to make the decision identified in the recommendation and ongoing legal advice will be provided.
OTHER IMPACTS, RISKS & OPPORTUNITIES	Yes	The appropriation of the Civic Offices Site for planning purposes will allow its redevelopment which your officers believe will promote the economic, social and environmental well-being of the area.
IMPACT ON SPECIFIC WARDS	Yes	Malinslee Ward

PART B) – ADDITIONAL INFORMATION

4. INFORMATION

Background

- 4.1 On 29 March 2012 Cabinet resolved in principle that the Civic Offices Site was no longer required to be held by the Council for office and associated car parking purposes. The Civic Offices Site is shown for identification purposes edged in red on the plan at Appendix 1 to this report.
- 4.2 The Council's in principle decision to appropriate the Civic Offices Site was advertised in a local newspaper on two consecutive weeks (20 April 2012 and 27 April 2012 respectively) allowing a 21 day period from the first advertisement for representatives to be made.
- 4.3 Following the advertising process a single representation has been received (dated 11 May 2012) from the Telford Trustee's (owners of the Telford Shopping Centre) solicitors Nabarro

Appropriation

- 4.4 The regeneration of Telford Town Centre is a key priority for the Council. In May 2009 planning permission was granted allowing the Civic Offices Site to be redeveloped for use as an ASDA superstore. The redevelopment of the land for use as a retail superstore is restrained by restrictive covenants which provide that the land may only be used for office purposes with ancillary car parking. There are also other restrictive covenants that affect the use of the land. Even if the ASDA superstore did not proceed, and even if in the longer term the land were to be used for other planning purposes than as a superstore, it would be important that the restrictive covenants could not prevent beneficial development and uses.
- 4.5 The Council has, in these circumstances, three options for dealing with the restrictive covenants:
- 4.5.1 Release of the rights by agreement
This is only potentially effective where the landowners benefitting from the restrictive covenants can be identified. It is not possible to identify all landowners with the benefit of the rights. There is no certainty that acceptable terms could be achieved even if all landowners could be identified and it is considered unlikely that acceptable terms could be agreed within the timescale required.
- 4.5.2 Section 84 Law of Property Act 1925 application for release from the Upper Tribunal (Lands Chamber)
- 4.5.2.1 The process is time consuming and requires that steps are taken to identify and notify benefitting landowners of their right to object to the removal of the restrictive covenants.
- 4.5.2.2 There is no guarantee the application would be successful.
- 4.5.2.3 In the circumstances officers do not consider that it is appropriate or necessary for the Council to seek to initiate proceedings under Section 84.
- 4.5.3 Appropriating the land for planning purposes
In circumstances where a local authority appropriates land in accordance with section 122 Local Government Act 1972 to a planning purpose section 237 Town and Country Planning Act 1990 authorises the interference with rights (including restrictive covenants) where the land is developed in accordance with planning permission. Landowners with the benefit of an overridden restrictive covenant are entitled to claim compensation. This is calculated on the same basis as if the land had been compulsorily acquired.

Appropriating the Civic Offices Site for planning purposes

- 4.6 In accordance with section 122(1) Local Government Act 1972 in order to appropriate land from one function to another a local authority must be satisfied that the land is no longer required for the purpose for which it is held immediately before the appropriation.
- 4.7 On 29 March 2012 (paragraph 4.1 above) Cabinet resolved, in principle, that the Civic Offices Site was no longer required to be held for office accommodation and associated car parking purposes because that use is due to expire in early 2013. Those circumstances remain unchanged.
- 4.8 Before reaching a final decision as to whether to resolve to appropriate the Civic Offices Site to a planning purpose the Council must:
- 4.8.1 firstly satisfy itself that the appropriation will facilitate the development, redevelopment or improvement of the Civic Offices Site, which, in turn, will contribute to the promotion of the economic, social or environmental well-being of its area; and

- 4.8.2 secondly weigh the benefits of overriding the restrictive covenants against the effect of doing so on landowners who benefit from the covenants taking into account the circumstances and the availability of compensation.
- 4.9 The removal of the restrictive covenant affecting the land is essential to its redevelopment for retail purposes.
- 4.10 The redevelopment of the Civic Offices Site in accordance with the planning permission will contribute to the achievement of the promotion or improvement of the economic, social and environmental well-being of the area in:
- 4.10.1 economic terms – by helping to support the regeneration and enhancement of Telford Town Centre
- 4.10.2 social terms – through the provision of additional employment and investment opportunities which in turn will help to promote increase expenditure within the local economy which will help to support existing businesses within the town and wider region
- 4.10.3 environmental terms – by significantly improving the current Civic Centre Site. The proposal will maximise the Site's potential, will create and reinforce pedestrian linkages to produce a safe and secure environment and will be accessible, and sustainable
- 4.11 None of the alternatives available for dealing with the restrictive covenants are as effective as appropriating the Civic Offices Site for planning purposes. This is so whether or not the ASDA superstore proposal proceeds (as is intended).

Representations received

- 4.12 Following the advertising process (paragraph 4.3 above) a representation was received from Nabarro LLP solicitors on behalf of the Telford Trustees which identifies the following objections to the Council appropriating the Civic Offices Site for planning purposes:
- 4.12.1 **(Paragraph 3) Appropriating the Civic Offices Site for planning purposes is the equivalent of the compulsory acquisition of the Council's own land and as such the Council must demonstrate a degree of requirement or necessity to the use of the power.**
RESPONSE - It is not accepted that appropriating land for planning purposes is equivalent to compulsory purchase. The appropriation must be for purposes for which land could be or could have been acquired under section 226 Town and Country Planning Act 1990 (as amended) ("Compulsory acquisition of land for development and other purposes"). The legal test is therefore whether the Council thinks that the appropriation will facilitate the carrying out of the development/redevelopment or improvement on or in relation to the land so as to promote the economic, social or environmental well-being of its area. Those considerations are the subject of this report and Cabinet's decision.
- 4.12.2 **(Paragraph 4) Appropriation is unnecessary; the Council could sell the land without appropriating it for planning purposes.**
RESPONSE - The Council could sell the land without first appropriating it for planning purposes. However, if it did, there is a serious risk that the site would not be developed for retail purposes in accordance with the planning permission as there is a realistic possibility that the Telford Trustees would be unwilling to release the restrictive covenants affecting the site because of their interest in redeveloping a competing site in their ownership. There is also the question of other unidentified landowners with the benefit of the rights, as referred to in paragraph 4.5.1 above, and the question of time-scale. Officers are satisfied that any alternative would delay, to a considerable extent, and possibly frustrate altogether, redevelopment and therefore jeopardize the economic, social and environmental benefits which it is desired to achieve by redevelopment.

4.12.3 **(Paragraph 5) the Council is using a discretionary power to override third party rights in order to “achieve a financial gain for the Council by selling its land at a more advantageous price”.**

RESPONSE - When rights are overridden there is an obligation to pay compensation. This is calculated on an identical basis to compensation for the breach of a restrictive covenant, that is, on the extent to which the land benefiting from the right is diminished in value. On this basis the landowner benefiting from the right will not suffer any loss of value. It is therefore incorrect to assert that the Council will financially benefit from appropriating the Civic Offices Site for planning purposes.

4.12.4 **Breach of human rights (Paragraph 6 and onwards)**

RESPONSE - The appropriation for planning purposes will not interfere with property rights under Article 1 of the First Protocol to the European Convention on Human Rights. If and when development occurs, property rights will be overridden, at which time compensation will be payable. Any such later interference with human rights serves a legitimate purpose, is in accordance with law, and is proportionate, especially given the payment of compensation.

4.12.5 **Perversity and procedural unfairness (Paragraph 7)**

RESPONSE - The Council accepts that it must act reasonably and fairly, having regard to all material considerations. It has endeavoured to do so in all its actions, including the present proposal that the Civic Offices Site be appropriated for planning purposes in the public interest.

Impact

4.13 In assessing the impact of the proposed appropriation of the Civic Offices Site by the Council for planning purposes the Council has taken into account the representations received from the Nabarro LLP solicitors (on behalf of the Telford Trustees) as referred to above in paragraph 4.12 and the other impacts referred to in Section 3 above.

4.14 A further and final opportunity will be given to the Telford Trustees to make any further written submissions in connection with the proposal to be considered by Cabinet.

Conclusion

4.15 Having taken into account the objections made by the Telford Trustees to the Council appropriating the Civic Offices Site for planning purposes (but subject to receipt of any further written submissions) and weighing these objections against the benefit the redevelopment of the land will bring to the economic, social and environmental well-being of the area, and in particular Telford town centre, your officers are of the view that there is clear evidence that the public benefit of appropriating the Site for planning purposes outweighs the potential private loss that may be incurred and recommend that Cabinet resolve to appropriate the Civic Offices Site for planning purposes in accordance with section 122 Local Government Act 1972.

5. IMPACT ASSESSMENT – ADDITIONAL INFORMATION

None

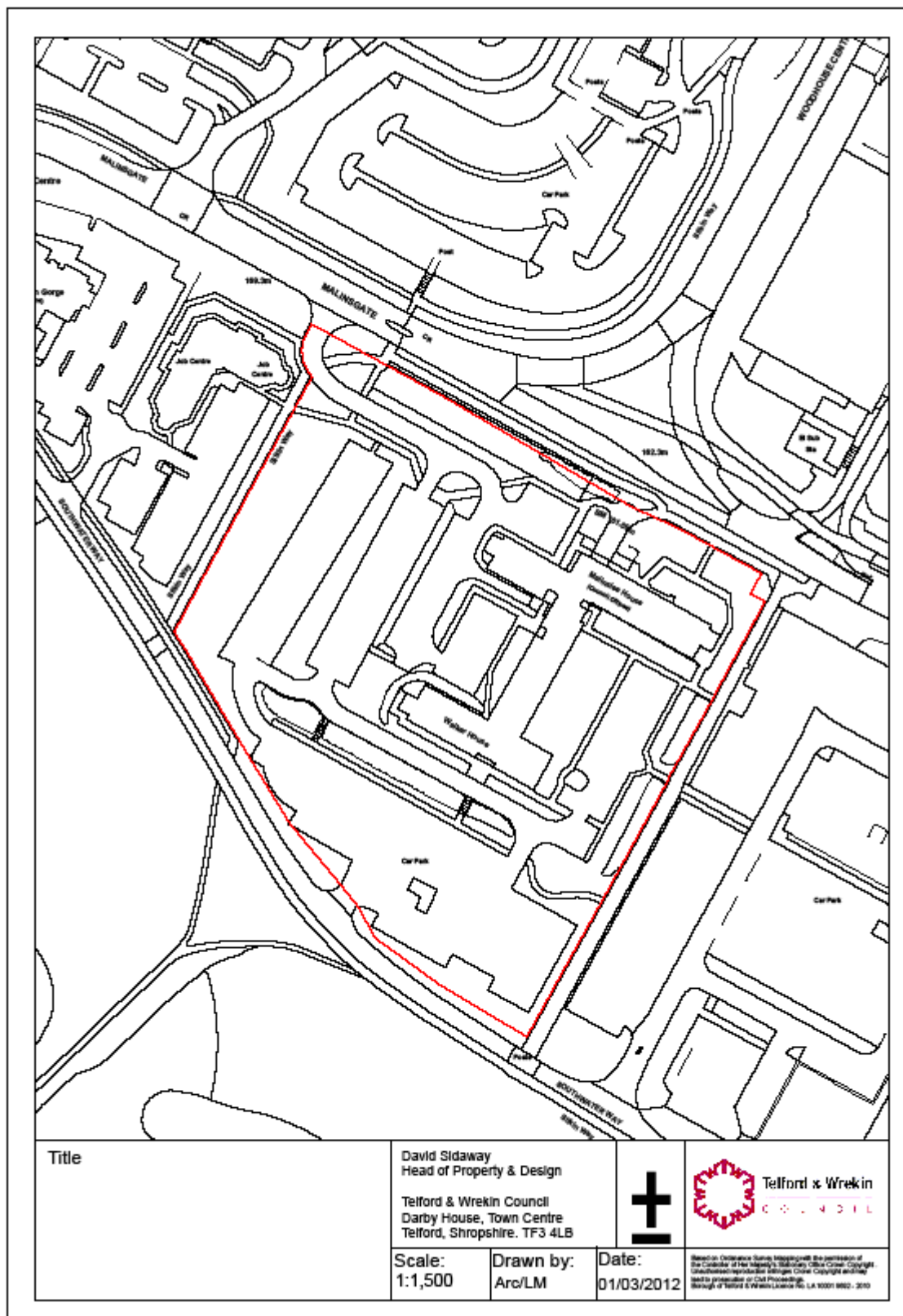
6. PREVIOUS MINUTES


CB 165	9 March 2009
CB 204	11 May 2009
CB 113	29 March 2012

7. BACKGROUND PAPERS

None

Appendix 1 - Plan of land to be appropriated



Title	David Sidaway Head of Property & Design		 Telford & Wrekin COUNCIL
	Telford & Wrekin Council Darby House, Town Centre Telford, Shropshire. TF3 4LB		
Scale: 1:1,500	Drawn by: Arc/LM	Date: 01/03/2012	<small>Based on Ordnance Survey data. All rights reserved. The copyright of the Council of the County of Shropshire. All rights reserved. Copyright and/or other intellectual property rights are acknowledged. All rights reserved. Borough of Telford & Wrekin. Licence No. LA 10001 9902 - 2010</small>

Appendix 2 - Copy of representation letter from Nabarro Solicitors



By email and recorded delivery (emma.harvey@telford.gov.uk)

Telford and Wrekin Council
Legal Services
3rd Floor East
Civic Offices
Telford
TF3 4HD

For the attention of: Mr Jonathan Eatough, Head of Legal Services

11 May 2012

Our ref: FB/IPT/T1784/00301

Dear Sirs

Proposed development of civic offices site at Southwater Way

In your letter dated 23 March, you said that our client was entitled to make representations in respect of the decisions referred to in the report attached to your letter, which report was due to be considered by the Council's Cabinet at its meeting on 29 March. At its meeting on 29 March, the Council's Cabinet made certain decisions in relation to the Civic Office site, as set out in the minutes of that meeting, as published on 4 April.

The purpose of this letter is to set out our client's representations in relation to those decisions. The contents of this letter repeats to an extent our letter dated 31 October 2011. We wish to make it clear, however, that the steps taken by the Council since that letter do not fully address the issues raised in that letter. Any decision to appropriate the land for planning purposes must be taken under, and in accordance with the requirements of, section 122 of the Local Government Act 1972 (the "1972 Act"). The basis upon which such a decision is taken by the Council is reviewable by the High Court on an application for judicial review.

Any decision by the Council to appropriate, and then for itself or a successor in title to seek to rely on section 237 of the Town and Country Planning Act 1990 (the "1990 Act"), could result in our client being unable to enforce the private law rights set out in our letter dated 7 October 2010, albeit our client would be entitled to statutory compensation. As a result, such an appropriation could result in a significant interference with our clients' rights and would be equivalent to a compulsory purchase of those rights. In support of that view, our client relies on the leading decision on the exercise of the power to appropriate, *R v Leeds City Council, ex parte Leeds Co-operative Society (1997) 73 P & CR 70*, in which McCullough J said: "I regard it as significant that a single provision in the 1990 Act, section 226, empowers an authority both to acquire land compulsorily and to "appropriate" its own

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T1784/00301/83191795 v.1



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land. I see "appropriation", therefore, as the equivalent of compulsory purchase of a council's own land, and the same degree of "requirement" or "necessity" should apply in each case."

The Council wishes to dispose of land which it owns and which we understand will no longer be needed for its original purpose. That process could be carried out without an appropriation. An appropriation is only necessary in law if the Council itself intends to carry out a development of its land or change its use to a different purpose. Presumably, the Council is not proposing to run a supermarket. The only purpose of an appropriation would be to increase the amount which the Council receives for selling its land, by conferring rights upon the purchaser which the purchaser would not otherwise have. Those rights would be exercisable against our clients.

In other words, a discretionary statutory power, which when exercised has the effect of overriding our clients' private law rights, is being exercised in favour of a third party in order to achieve a financial gain for the Council by selling its land at a more advantageous price. Such a process is unsupportable as a proper and valid exercise of public powers. If the Council wishes to negotiate with those entitled to the benefit of restrictive covenants in order to remove those covenants, then of course they can do so. In the final analysis, there is a power to apply to the Lands Chamber of the Upper Tribunal under section 84 of the Law of Property Act 1925 for a discharge or modification of a covenant. An appropriation is not necessary to enable the Council to dispose of its land.

The making of an appropriation, taking into consideration the adverse effect which it has and the possible transfer of a part of the value of the land from one private person to another at the expense of our client, is neither (a) necessary in the language of McCullough J or (b) justifiable, having regard to the ordinary obligations of openness and fairness in public law, as today reinforced by the European Convention on Human Rights and the Human Rights Act 1998. The unjustifiable nature of what appears to be proposed is compounded by the deliberate and unacceptable secrecy and withholding of information which has characterised this matter, and which has previously been raised with you.

A decision to appropriate under section 237 of the 1990 Act could have a significant impact on our clients' legal rights. It would be perverse and procedurally unfair for the Council to reach that decision without full and proper consideration of all material considerations, and a full and public decision-making process. The principle of fairness in administrative law applies to decisions to appropriate land as it applies to all administrative decisions which may adversely affect particular members of the public.

Article 6(1) of the European Convention on Human Rights states that "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." The appropriation of our clients' rights would be a determination of their civil rights and it is highly important that the Council in this context is completely open in its dealings with our clients in respect of any decision to appropriate. To date, the Council has not been open with our clients on this issue: for example,

- (a) According to David Sidaway's witness statement dated 8 March 2011, the Council's Cabinet delegated the use of the power to appropriate under section 122 of the 1972 Act to the Council's Head of Asset & Property Management, at its meeting on 9 May 2009. The relevant section of the report to that Cabinet meeting was, however, not made public and the Cabinet's discussions on the issue were held in private session. This is unjustified and unacceptable.



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- (b) The public minute of the decision to delegate the powers made no reference to appropriation or section 122. It merely stated that delegated authority be given to the Head of Asset & Property Management, following consultation with the Head of Legal Services and the Cabinet Member for Regeneration, "to take any required steps to facilitate the changes detailed in the report." It is not therefore possible for our clients, without access to the report, to see what the decision actually reached was, or the basis and justification for that decision. To make any sense of the Cabinet's decision, one would have to see a copy of the report, which has been withheld by the Council.
- (c) In his witness statement David Sidaway also said that the report to that Cabinet meeting was prepared and the decision taken "to ensure that the Council and Second Respondents," meaning Asda Stores Limited, "were confident that the Council were prepared to utilise these powers, if necessary, to ensure that the development could proceed as planned." As a result, it is clear that the Council has pursued a course to provide Asda with confidence in relation to its land deal with the Council on a confidential basis, without our clients being able to understand the decision taken or its basis or justification. An act akin to a compulsory purchase cannot be carried out with such secrecy and the withholding of information from those who may be adversely affected.

Whilst we have not seen the report to the Cabinet meeting on 9 May 2009, we would also question whether the decision of the Cabinet at that time can remain a valid basis for the delegation of powers, given the changes in circumstances since that time. For example the change in the Council's position in respect of the relocation of its offices since that date, and the decision to exclude the site from the extension of the Primary Shopping Area in the Central Telford Area Action Plan which recognised that in planning terms the site is not appropriate for allocation for retail purposes. It seems to us that there can no longer be any compelling reason to appropriate having regard to the change in circumstances. Please would you now send us a copy of the report to the Cabinet meeting on 9 May 2009 and provide the two confirmations sought in our letters of 5 and 26 August 2011 and 13 September 2011.

The Report of the Assistant Director (Development, Business and Housing) enclosed in your letter dated 23 March recommends to Members that they decide in principle to appropriate the Civic Offices Site for planning purposes subject to the consideration of representations as to the effect taking that step will have on affected landowner's interests. The Report goes on to state that the proposed new use as a superstore is restrained by a number of restrictive covenants which affect the Civic Offices Site, and that to avoid the effect of these restrictive covenants the Council is likely to wish to rely on Section 237. The Report reinforces the concerns expressed elsewhere in this letter about the overriding of our client's private law rights.

The Decision of the Members enclosed with your letter dated 19 April states that the Members have already decided that the appropriation of the Civic Offices Site for planning purposes be approved in principle, subject only to the consideration of representations as to the effect that may have on affected landowner's interests. Furthermore, there is no indication that the Council has considered the wider public interest. We therefore look forward to receiving in due course a copy of the further Report to Members on the issues raised in this letter, and of their Decision based upon that Report.

Finally, the Report enclosed with your letter dated 23 March 2012 states that a full impact assessment will be undertaken as part of the process in considering any representations made if the recommendations are approved. There may be further representations that our client would wish to



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make when it is known what factors have been taken into account by the Council in its impact assessment. It is also not entirely clear whether that impact assessment will deal only with issues raised by consultees, or whether it will be more wide-ranging. In any event, it is difficult for our client to comment any further until it knows what factors the Council has taken into account in making its decision.

Yours faithfully

NABARRO LLP

Enc