



Application No: 150239

Location: Land to north/south of, Tollgate West, Stanway, Essex

Scale (approx): 1:1250

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7.3 Case Officer: Vincent Pearce

MAJOR

Site: Land to north/south of, Tollgate West, Stanway, Essex

Application No: 150239

Date Received: 5 February 2015

Agent: Mr Paul Newton

Applicant: Tollgate Partnership Limited

Development: Outline application for mixed used development of leisure uses (use class D2) including cinema and retail (use classes A1,A2,A3,A4 and A5) with associated parking including multi-storey car park,public realm improvements,access,highways,landscaping and associated works.

Ward: Stanway

Summary of Recommendation: Refusal

1.0 Reason for Referral to the Planning Committee

- 1.1 This application was reported to and considered by the Planning Committee on 17th December 2016 at which the 'Deferral & Recommendation Overturn Procedure' [DROP] was triggered. [PART 5 Section B, Schedule 4: Planning Procedures Code of Practice 2015].
- 1.2 The report that was presented on 17 December is reproduced later as part of this supplementary report.
- 1.3 The Minute of the 17 December 2015 meeting records :-that

“RESOLVED that the Deferral and Recommendation Overturn Procedure be invoked and a further report be submitted to the Committee giving details of the risks to the Council, the financial implications including the need to refer the matter to the Secretary of State for Communities and Local Government, together with recommended conditions and Heads of Terms should the application be granted. “

[Minute 252 as presented to and agreed by the Planning Committee at the meeting of 4 February 2016.]

1.4 Comment on DROP procedure for readers of this report:

The procedure for “overturning” recommendations is described and explained in detail within PART 5 Section B, Schedule 4: of the Council’s Planning Procedures Code of Practice 2015]

(1) When the Planning Committee disagrees with their professional Planning Officer’s advice the Councillors can raise a motion to overturn the recommendation. This motion should include clearly stated planning reasons so that other Councillors of the Committee can decide whether they agree or disagree. The reasons should be “reasonable” as defined within planning law, and should explain how the Development Plan and other material considerations have been taken into account to justify the motion. Once the mover of the motion has stated their reasons for suggesting the Committee act contrary to the Officer’s recommendation this motion must still be seconded. The seconder should also set out their own analysis of the Development Plan and other material planning considerations so that they can again demonstrate their own “reasonableness” in the decision making process. “

1.5 This Supplementary Report provides that requested information. The recommendation from officers remains unaltered from that of 17 December 2015.

1.6 Report Contents

Members are advised that the remainder of this report is set out as follows:-

2.0 Synopsis

3.0 Risks to the Council of approving the application

3.16 Implications for existing Adopted Local Plan

3.18 Implications for the Local Plan process

3.33 Implications for Stane Park appeals

4.0 The Strategic Plan 2015-2018

4.1 Northern Gateway

4.8 Impact on the Town Centre

4.12 Town Centre investment

5.0 Financial and procedural Implications of approving the application

5.1 Implications for Judicial Review - financial and other costs

5.12 Departures from the Development Plan and “call-in” for Determination by the Secretary of State.

5.18 Appeals under s38 of the Town & Country Planning Act

6.0 Consultation responses received since 17 December 2015

7.0 Suggested conditions and Heads of Terms

7.4 Current Obligations list

8.0 Draft conditions

9.0 Conclusions of 18 February 2016 report

10.0 Recommendation for 18 February 2016 report

11.0 Report from 17 December 2015 meeting

Appendix 1 NLP comments

Appendix 2 Letters from English heritage and Aquila developments

Appendix 3 – Report as presented to Committee on 17th December 2015

2.0 Synopsis

2.1 This report focuses on the additional information requested by the Chairman and is split into the three sections outlined at 1.3 above.

2.2 The report, having considered all material planning considerations, including the supplementary information reported below, continues to recommend that the proposed development be refused. It does so, on the basis of:

- the significant increase in town centre use floorspace proposed which would fundamentally challenge the existing spatial hierarchy which puts the Town Centre at the top of the hierarchy;
- the resultant significant loss of high quality strategically important employment land at Stanway contrary to Council policy safeguarding high quality employment land in Strategic Employment Zones
- the consequential undermining of the Council's adopted local plan and employment strategy which are designed to widen the economic base of the Town and protect the viability and vitality of the town centre thereby undermining sustainable development principles;
- it is considered that this speculative proposal is premature and seeks to pre-determine the established hierarchy via the development process instead of the appropriate and established local plan process resulting in harm through the elevation of Tollgate in the hierarchy without the consideration of that consequence through the development plan on other centres and in particular, the town centre;
- Finally, the benefits arising from the proposal in the form of an expansion in jobs and the widening of local consumer choice along with, the boost to the local economy in Stanway and limited public realm improvements do not outweigh the harm that will arise as a result of the undermining of Colchester's retail hierarchy and the consequent retail growth stagnation and harm to investment confidence in the Town Centre.

SUPPLEMENTARY REPORT FOR 18 FEBRUARY 2016 MEETING

The previous report presented to Committee on 17 December 2015 is reproduced at the end of this report as it continues to form one of the material planning considerations.

3.0 The Risks to the Council of Approving the Application

There are a number of risks to the Council should the Planning Committee be minded to approve the application. These include the following;

- Risks associated with undermining the existing adopted Local Plan

- Retail Hierarchy
- Stane Park appeals
- Risks to the production of the new local plan
- Concern about the ability to deliver the objectives of the Council's Strategic Plan
- The Council's Strategic Plan 2015 -2018 sets out the Council's "direction and potential for the Borough" It describes the ambitious range of goals that the Council will look to successfully deliver for the people of Colchester. It is not a planning document but some of the objectives therein are related to the planning process. It is divided into four main themes:-
 1. Vibrant
 2. Prosperous
 3. Thriving
 4. Welcoming

3.1 Of particular interest are the following elements of the Strategic Plan;

- [Vibrant] Enhance the diverse retail and leisure mix supporting independent businesses valued by residents and visitors
- [Prosperous] Promote Colchester to attract inward investment and additional businesses, providing greater and more diverse employment and tourism opportunities
- [Thriving] Promote Colchester's heritage and wide ranging tourism attractions to enhance our reputation as a destination
- [Welcoming] Make Colchester confident about its own abilities to compete with the best of the towns in the region to generate a sense of pride.

3.2 The Council's Adopted Local Plan documents set out the Council's planning policies but Members will note that the way in which the Council's Strategic Plan objectives get delivered may in part be through the planning process.

3.3 In considering these the Planning Committee can only have regard to the planning issues raised by the Tollgate Village proposal and cannot have any regard to the Council's position as land owner on any (or part of any) other site that may be affected by the Tollgate village proposal.

3.4 It is important to state this clearly as it would pose a significant risk to the Council if the Planning Committee were in any way to have regard to the Council's commercial/financial position as a land owner. These risks include:-

- Legal challenge on the basis that the decision was flawed as a result of the Committee having had regard to matters that should not have been taken into account (i.e. the wider financial interest of the Council)
- Loss of public confidence in the operation of the planning system in Colchester

- Tarnishing of the reputation and integrity of the Council
- Claims of impropriety and unfair bias

3.5 The Council's Planning Procedures Code of Practice sets out the framework within which planning decisions at Colchester will be taken and suggests how risks can be minimised:-

Introduction: paragraph (iv) states

"Councillors have a special duty to their constituents, but their first duty is to the whole community of the Borough of Colchester. They must vote in the interests of the whole Borough where planning matters are concerned. Councillors, like Officers, should have regard to the law, statutory duties, national policy, the Development Plan and all other relevant material planning considerations (The Development Plan incorporates the adopted Colchester Borough Core Strategy, Development Policies, and Site Allocations)."

3.6 Section1: paragraph (2) states:-

"The planning system exists to consider development proposals in the light of the wider public interest. Councillors must take into account the interests of the whole of the Borough of Colchester and act in a way which is fair and is clearly seen to be so. There is also a presumption in favour of sustainable development, and encouragement for Local Planning Authorities to take a positive approach towards planning decision making.

3.7 The Code of Conduct makes it clear that whilst parochial considerations are important these should be secondary to an overall duty to consider the interest of the Borough as a whole. This is the basic tenet of the English Planning system and the role of planning committees.

3.8 The reference in the Code of Conduct to the need to have regard to the Development Plan is fully in line with the National Planning Policy Framework which members will recall from planning training usefully describes the significance of an up to date Local Plan and its role in guiding decisions:-

3.9 It states in paragraph 007 of "How must decisions on applications for planning permission be made?" that:-

"To the extent that development plan policies are material to an application for planning permission the decision must be taken in accordance with the development plan unless there are material considerations that indicate otherwise".

3.1 The NPPF stresses importance of a plan-led system. Where proposals accord they should be approved without delay.

"Where a development plan is absent, silent or the relevant policies are out of date the NPPF requires the application to be determined in accordance with the presumption in favour of sustainable development"

- 3.11 Members' attention is drawn to the Government's reference to planning being 'plan-led' because the English planning system is based on local planning authorities setting out their planning policies which then direct development. This provides the development industry, prospective developers/investors, landowners and the public certainty as to how development proposals will be assessed by the local planning authority and is also meant to avoid rogue decisions being taken.
- 3.12 That said the advice does allow decisions to be taken that do not accord with the development Plan where material considerations that indicate otherwise. This supplementary report will consider what these might be in the context of the Tollgate Village development.
- 3.13 At the meeting of 17 December 2016 comment was made during discussion to the effect that 'the Town Centre must stand on its own two feet'. The NPPG is helpful in assessing the extent to which the Government accepts that proposition. In paragraph 001 it states:-
- "Local planning authorities should plan positively, to support town centres to generate local employment, promote beneficial competition within and between town centres, and create attractive, diverse places where people want to live, visit and work"
- "Local authorities should plan... adopting a town centre first approach and taking account of specific town centre policy. In doing so, local planning authorities need to be mindful of different rates of development in town centres compared with out of centre."
- "...The impact test determines whether there would be likely significant adverse impacts of locating main town centre development outside of existing town centres (and therefore whether the proposal should be refused in line with policy)..."
- 3.14 In this context the Government is strongly advising local authorities to take care to ensure that planning decisions do not undermine the important role that Town Centres play in the life of towns. This would tend to suggest that it is inappropriate to suggest that Town Centres must 'stand on their own two feet' if that means abandoning adopted retail hierarchy policies to allow major departures from that policy outside of designated centres.
- 3.15 In restating this, officers are anxious to ensure that the context for doing so is clearly understood. It is not a question of officers trying to apply undue pressure on councillors. That would be wholly unacceptable and improper and is alien to the relationship that has been cultivated over decades in Colchester. That is not the intention. The wider implications are therefore explored below in line with the minute of 17 December 2015.

3.16 Implications for the existing adopted Local Plan

The Council considers that it has an up-to-date Local Plan which should serve as the basis for decision-making in line with national planning policy. Section 38(6) of the Planning and Compulsory Purchase Act 2004 and paragraph 11 of the National Planning Policy Framework both state that applications must be determined in accordance with the development plan unless material considerations indicate otherwise. Appeal decisions within Colchester have established that its Local Plan, as modified by the Focused Review in 2014, is up-to-date and a valid basis for the determination of planning applications. These include for example the decision on the Horkesley Park leisure/retail proposal where the Inspector found that: “The development plan should therefore not be considered absent, silent or relevant policies to be out-of-date and the appeal should be determined against the development plan unless other material considerations indicate otherwise” (APP/A1530/A13/2195924, February 2014). Implicit in the March 2014 appeal decision rejecting the use of two units within the Tollgate West Business Park for retail purposes was the principle that the Council’s planning policies were up-to-date (APP/A1530/A/14/2212689).

- 3.17 A decision to approve the scheme would accordingly need to be based on the view that material considerations were strong enough to outweigh the policy presumptions against a scheme which did not accord with plan policies in terms of the spatial hierarchy, sustainable development and employment land.

3.18 Implications for the Local Plan process

Approval of the scheme in advance of publication of the Council’s Preferred Options for a new Local Plan would prematurely close off options that should be made through the Local Plan process and not by an isolated development management decision. Granting planning permission now for a large scale development outside the scope of adopted policy is considered to harm the robustness of strategic long-term planning for the area, with particular regard to the following issues:

- 3.19 Spatial Hierarchy: The scale and extent of the Tollgate proposals are considered to be significant enough to alter the balance and functionality of centres within Colchester. Plan policies help guide investment decisions, and if a particular centre is promoted, this will inevitably have consequences for competing centres. The development proposals, in combination with existing uses, would provide a concentration of over 50,000 sq.m gross of Class A uses and a new leisure destination. A centre of this size would be more than two and a half times bigger than the next largest UDC (Turner Rise) and, particularly given the focus of the other four Urban District Centres (UDCs) on convenience rather than comparison shopping, would provide a clear challenge to the predominance of the Town Centre as the pre-eminent destination in the Borough for comparison shopping.
- 3.20 Such a significant alteration to the Borough’s spatial hierarchy involving the introduction of a new level below the Town Centre but above the size of existing UDCs should be considered through the plan-making process. This would involve consideration of the need for such a centre; the effects of such a centre on existing and potential Borough links, travel patterns, and functions; and the analysis of alternative sites. Whilst the spatial strategy for the Borough is currently under review, initial work and national guidance supporting prioritisation of the Town Centre do not support introduction of a new tier into the spatial hierarchy. In fact, the lack of clarity arising from the NPPF definition of centres over what sort of town centre activities

should be encouraged in an UDC support a simpler hierarchy removing the UDC designation from the Council's hierarchy. An approval of the Tollgate development at this stage of the plan-making process would accordingly limit the Council's ability to safeguard and promote the Town Centre.

- 3.21 New Retail Allocations: Development of Tollgate would also reduce the potential requirement for new retail space anywhere in the borough to be identified and allocated as part of the Local Plan process. There is a limited amount of new expenditure created by a growing population and careful consideration should be given to where new retail space is provided. Given that new investment is required to maintain the Town Centre's position, the lack of expenditure capacity justifying growth opportunities would limit the Council's ability to argue for regeneration of town centre sites such as Priory Walk, St. Botolph's and smaller brownfield sites, in addition to the existing commitment at Vineyard Gate. An update on retail capacity will be provided at the meeting following the decision on the application for a Sainsburys store at the Hythe.
- 3.22 Employment land supply: To grant planning permission would, in effect, release a significant amount of employment land for development outside the Local Plan review process, against the current intentions of the local planning authority. This would also conflict with the advice in the Framework, which makes clear that the preferred route by which such releases are decided is through the Local Plan process [para. 14].
- 3.23 Ruling out the Tollgate employment land in advance of the new Local Plan is accordingly considered to ignore the latest developments in the area and to pre-empt the process of considering the wider spatial and phasing issues in a Borough-wide context. The recent upturn in the take-up of employment premises in Tollgate highlights the rapid nature of change in the commercial property market and the need to retain flexibility and additional capacity. The Borough needs to ensure that the longer term employment options for the area are not limited by the premature removal of a site well placed to meet the need for B employment uses. Applying the test in NPPF Para 22, it is considered that there is a reasonable prospect of the land being used for employment purposes, and it is therefore justifiable to continue to safeguard the land within the Strategic Employment Zone for B uses.
- 3.24 The Review of the Local Plan is the most appropriate process to look at retail and employment needs across the borough to ensure there is sufficient land, in the right places to support residential communities. Stanway will be included in this review. It is therefore considered that the scale of the development justifies a refusal on grounds of prematurity.
- 3.25 Annex 1 of the National Planning Policy Framework explains how weight may be given to policies in emerging plans. However in the context of the Framework and in particular the presumption in favour of sustainable development – arguments that an application is premature are unlikely to justify a refusal of planning permission other than where it is clear that the adverse impacts of granting permission would significantly and demonstrably outweigh the benefits, taking the policies in the Framework and any other material considerations into account. Such circumstances are likely, but not exclusively, to be limited to situations where both:
- a) the development proposed is so substantial, or its cumulative effect would be so significant, that to grant permission would undermine the plan-making

process by predetermining decisions about the scale, location or phasing of new development that are central to an emerging Local Plan or Neighbourhood Planning; and

- b) the emerging plan is at an advanced stage but is not yet formally part of the development plan for the area.

- 3.26 Refusal of planning permission on grounds of prematurity will seldom be justified where a draft Local Plan has yet to be submitted for examination, or in the case of a Neighbourhood Plan, before the end of the local planning authority publicity period. Where planning permission is refused on grounds of prematurity, the local planning authority will need to indicate clearly how the grant of permission for the development concerned would prejudice the outcome of the plan-making process.
- 3.27 Officers believe that the proposal falls well within the category of development identified as substantial with a significant cumulative effect which pre-determines decisions about the location and phasing of new development. The risk to the Council is if the application were to be refused and an appeal submitted, whether an Inspector would consider the Local Plan to be at an advanced stage.
- 3.28 The Council intends to consult on Preferred Options for its new Local Plan in June and July of this year with approval of the submission version in December. This timetable also accords with those of Chelmsford, Braintree and Tendring Councils. Joint work is underway with the other Councils under the Duty to Co-operate and the Department of Communities and Local Government (DCLG) have awarded a grant of £640k to investigate the potential for new Garden Settlements in a number of locations, two of which are cross border sites. The nearest site being investigated for a Garden Settlement is at Marks Tey, less than 3 miles from the application site. Any decision taken on Tollgate could therefore impact on the future strategic planning not just in Colchester but also Braintree. One of the key principles in the Government document "Locally led Garden Cities" is that garden settlements are expected to have "strong local cultural, recreational and shopping facilities in walkable neighbourhoods." If retail facilities are available in a sub-regional scale centre less than 3 miles away it is difficult to envisage shopping facilities within any future garden settlement at Marks Tey.
- 3.29 An additional risk therefore for the Council to consider is if another Council argued that CBC had failed under the Duty to Co-operate by taking strategic growth decisions through a planning application that ought to be considered through examination of a plan. Chelmsford City Council have objected to the Tollgate Village application.
- 3.30 The wording in the NPPF set out above is key. Part (B) states 'seldom' will prematurity 'be justified where a draft Local Plan has yet to be submitted for examination'. Helpfully the NPPG describes how a local planning authority will need to indicate how the grant of planning permission for the development will prejudice the outcome of the plan-making process. By implication this means that there are circumstances in which failure to meet circumstance (b) would not prejudice the use of prematurity as a reason for refusal.

3.31 Officers believe there are further exceptional circumstances in this instance that justify grounds of prematurity. The application has come in just as Local Plan policies and allocations for town centre uses are being reviewed for the Preferred Options consultation document to be published this summer to assess how they should address fundamental shifts in the retail and leisure worlds. Floorspace and location requirements are rapidly changing in the wake of the growth of internet shopping and click & collect; the challenge posed to existing chains by competitors such as smaller continental retailers; and the increasing importance of food/drink and leisure uses in retail centres. The impact of these changes has been demonstrated by the big four convenience retailers curtailing expansion plans and cutting large numbers of planned large stores from their build programmes. The Council has accepted the need to accept changes within existing retail developments within the Borough, but the weight of current trends does not support a significant increase in new large format out-of-centre developments. To the contrary, it reinforces the need to support the historic Town Centre as the appropriate focus for the demonstrable trend for high quality environments that combine retail and leisure attractions. If there is justification for further out-of-centre development (capacity for which would be extremely limited if Tollgate were approved), it should be pursued through the evidence based Local Plan process, which could come to the conclusion that future retail expansion should be on the other side of town. If approved the Tollgate Village development in tandem with the growth of regional competitors would soak up nearly all of the retail capacity in Colchester until 2026 (see paragraph 4.11 of NLP report appendix 1) In addition the capacity absorbed by the Sainsbury's proposal approved subject to S106 (yet to be signed) at the Planning Committee meeting of 4 February 2016 will effectively remove any capacity until 2026. This would mean that any ability for the Council to strategically direct retail floorspace over the forthcoming Local plan period would be lost

3.32 Members will therefore have to consider the risks associated with approving this development in terms of undermining the efficacy of the Local Plan process and the associated risk of a challenge under the duty to co-operate and the risk of a reason for refusal based on prematurity which is not subsequently supported at appeal.

3.33 Implications for Stane Park Appeals

Members will recall the in depth discussion that took place in September concerning two applications near to Tollgate at Stane Park for 6 restaurant/café/pub uses. These were refused on 17 September as being contrary to the local plan insofar as the development would firstly result in the loss of strategically important employment land and secondly would result in the creation of an out of town 'destination' that would harm the vitality and viability of the Town Centre

3.34 Whilst each application should be determined on its planning merits having regard to the development plan and other material planning considerations; relevant planning history is one such material consideration. The Stane Park proposals (now subject to appeals via public inquiry) may be distinguished from the Tollgate scheme as the uses do not include retail/leisure, being exclusively food/drink related. The site is also located entirely within an area allocated as a Strategic Employment Zone. The impacts are therefore different including the scale of impact. Nevertheless, there are similarities in terms of the associated strategic implications/nature of the impacts and these include the loss of Strategic Employment land with excellent transport links and

the predicted adverse impact on the Town Centre. Tollgate is dramatically greater in terms of the scale of development and its resultant impacts when compared to Stane Park. It could be argued that it would be inconsistent following the refusal of the applications at Stane Park to grant consent for a markedly greater scale of development that would also result in the loss of Strategic Employment Land that together could result in a greater scale of adverse impact upon the Town Centre. However, the difference in the scale of development proposed is reflected in the resultant growth that could be delivered by the current Tollgate scheme; albeit that this would be substantially at the expense of the Town Centre through trade diversion and redirection of planned growth. Members may be minded that these growth-related impacts are a material consideration that could justify departure from the local plan. Whilst your officers do not share this view, it could be held that this aspect distinguishes the proposals from the Stane Park appeals and that a different conclusion could be justified therefore

4.0 The Strategic Plan 2015 – 2018

As explained earlier the Council adopted its Strategic Plan in 2015 to set out the direction and future potential for the borough. The Council has an ambitious range of goals to achieve that build on the successes of the previous three years, working with a large number of partners to get the best for residents. Some of the actions in the Strategic Plan Action Plan are of relevance to the consideration of this application in referring to the Town Centre and Northern Gateway;

- Work with development partners to bring exciting new retail and leisure to the eastern part of Colchester town centre
- Ensure sufficient land is allocated in the right places to attract and retain businesses, supply homes and identify the infrastructure that is needed by developing a Local Plan for the borough
- Co-ordinate partners and funding streams in the Northern Gateway and the Hythe to generate a wide range of jobs and facilities
- Review the Better Colchester Town Centre website to promote Colchester
- Improve the walking and cycling links between Colchester North Station and the town centre through initiatives such as 'Fixing the Link'

Approval of the Tollgate Village application will impact on the Councils ability to deliver these actions. Further details are set out below.

4.1 Northern Gateway

Since 2006, the Council has held outline permission for sports and leisure uses on the Northern Gateway sites to the west of NAR3. The Stadium was the first element delivered in 2008. In addition, various infrastructure projects, including Junction 28, relocation of the BP garage, Axial Way and United Way, and more recently NAR3, have been developed to support the extant sport and leisure and employment outline permissions. The existing permission expires on 21 March 2016 if no compliant Reserved Matters application has been received by that date.

- 4.2 In accordance with that outline permission, the Council's preferred developer is currently in the process of arranging for a Reserve Matters Application to be made to deliver the anchor elements of the sports and leisure allocation within the Local Plan.

- 4.3 Council Officers believe that the borough cannot sustain 2 x large new cinemas together with the existing Odeon and forthcoming Curzon. If the departure at Tollgate is approved, this will risk the withdrawal of the anchor leisure element of the Northern Gateway scheme. If this occurs all the restaurant and extreme sports uses will also withdraw. Officers are not currently aware of other leisure anchors of similar stature that could be a viable replacement.
- 4.4 The Economic Growth team advises that such an outcome will risk the following benefits to the Borough that the Northern Gateway scheme will otherwise deliver:
- Loss of an annual rental income stream.
 - Loss of approximately £1.5m pa business rates income for the fully developed scheme.
 - Loss of 600 new full and part time jobs directly related to the Turnstone development and a consequent delay in the delivery of the 3500 jobs anticipated from the full development of the Northern Gateway.
 - Loss of an estimated 260 direct jobs that will be generated during the construction phase.
- 4.5 Although it is accepted that the job numbers described above, may be provided by the Tollgate scheme if the departure is supported, the proposed Tollgate development cannot provide for the Sports Village north of the A12, which will also be at risk of delivery if the commercial leisure scheme does not go ahead. Other than the obvious consequence of loss of considerable sport participation opportunities including a new home for the growing Colchester Rugby Club, the inability to move forward a scheme of this type at this time will put potential Sport England funding at risk and other emerging funding pots from a range of national governing bodies. This opportunity to develop new facilities, thereby increasing participation and sports performance levels within the Borough population, with proven benefits to the health of the Borough, will be lost. Whilst economic growth is a material consideration, members are reminded that the financial interests of the Council as landowner must be set aside in their consideration of the Tollgate proposals.
- 4.6 Furthermore the Economic Development Team indicates, it is currently anticipated that the proposed Northern Gateway sports and leisure scheme will provide a firm foundation, which, when mixed with the planned delivery of gigabit fibre connectivity, greatly increases the opportunity to attract real high value, high quality employment uses to the remainder of the site. If Tollgate proceeds and the Northern Gateway leisure anchor is lost, this foundation will be removed, with no certainty of being replaced in the near future.
- 4.7 The proposed developments at the Northern Gateway, both north and south of the A12, are expected to attract millions of visitors to the site on an annual basis. Officers believe these developments are complementary to the Town Centre and shall be taking proactive measures to encourage these visitors from both within and outside the Borough to visit and enjoy the quality facilities in the Town Centre, by means of the Park and Ride.

4.8 Impact on the Town Centre

The thrust of the NPPF and government retail guidance for many years has been about directing retail development to the town centre first. In determining retail decisions at all times it must be considered what will be the effect on the Town Centre as policy dictates. This proposal will affect the Town Centre by changing fundamentally the retail hierarchy in Colchester with the provision of a very extensive retail centre which will seek to trade in competition with the town centre by the nature of the retailers and the format from which they trade. That will inevitably have a powerful effect on shoppers' choices between the town centre and Tollgate.

- 4.9 Further work on the impact issue carried out by the Council's consultants NLP (attached as Appendix 1) calculated that:

Colchester town centre's comparison good turnover is projected to increase by +£87 million (14%) between 2015 and 2019, if the Tollgate Village development is not implemented. However if the Tollgate Village development and commitments are implemented, Colchester town centre's turnover (worst case) is projected to increase by only 1% between 2015 and 2019. Tollgate Retail Park's turnover is expected to double if the proposed development is implemented (para 4.5).

- 4.10 NLP conclude that 'If implemented Tollgate Village would as a maximum divert £803 million from Colchester town centre, which exceeds the projected available expenditure to support new comparison development in Colchester (£392 million). Therefore £411 million of the trade diverted to Tollgate Village from the town centre, is likely to be diverted from existing businesses and commitments in the town centre. Given the town centre's first policy, this £411 million diversion is a clear disbenefit of the development (Para 4.10, Appendix 1).
- 4.11 Tollgate Village is expected to attract £198m of trade from centres outside Colchester Borough over 10 years, which should benefit the local economy. Conversely the reduction in Colchester TC relative attraction with Chelmsford and Ipswich could result in the loss of £120 million, between 2019 and 2026.
- 4.12 At the Planning Committee on 4 February it was resolved to grant planning permission subject to a legal agreement for a new Sainsbury's superstore within the premises currently occupied by B & Q in Lightship Way, Hythe (ref: 143715). NLP have reviewed the cumulative impacts associated with this proposal, if implemented together with the Tollgate proposals. As the proposed Sainsbury's store at Lightship Way has been conditionally granted planning permission it therefore needs to be taken into account as a planned commitment. NLP's analysis of this proposal suggests the store will have a turnover of around £66.5 million (split (£49m convenience goods and £17.5m comparison goods). Allowing for trade draw from outside Colchester the proposed store is expected to reduce expenditure capacity in Colchester by £40m for convenience goods and £15.5m for comparison goods (assuming B&Q relocates to a reduced size store elsewhere in Colchester).
- 4.13 NLP's assessment of the Tollgate scheme indicates the convenience goods element of the scheme would still surplus expenditure capacity of £34m at 2019 and £78m at 2021. The addition of the Sainsbury's store will create a small deficit of -£6m at 2019,

but a surplus of £38m at 2021. For comparison goods the mix Tollgate scheme would create a deficit of -£60m at 2019 reducing to -£38m in 2021. The Sainsbury's store will create a larger deficit of -£75.5m at 2019 and -£53.5m at 2021. These updated projections indicate that the risk the town centre will stagnate for the next decade has increased.

4.14 Town Centre Investment

Approximately £500m has been and continues to be invested in the town centre since 2010. It is an ongoing figure not broken down into years as it includes pipeline projects such as Vineyard Gate. The 10 year investment plan includes the following projects some of which may not proceed if Tollgate Village goes ahead and there is not the investor confidence in the Town Centre;

- £15m on new / refurbished hotels: Greyfriars, Blue Ivy, Premier Inn and others in the pipeline
- £580k on refurbishing Mercury Theatre Studio
- £44m on improving retail: W&G refurb/extension, Lion Walk & Yard refurb, Culver Square and other shop refits
- £70m projected for Vineyard Gate
- £32m on improving places to visit such as The Castle Museum refurbishment and Firstsite plus
- £9m funding bid by the Mercury Theatre for improvements
- £30m New Magistrates' Court & more for public realm surrounding
- £7m new Park & Ride and Colchester Bus Station
- £7m further town centre road networks improvements 2016
- £3.5m for Creative Business Centre
- Relocation of the market (April 2015) with the intention and capability to have themed markets which could run into the evening.
- The investments by the current owners of Lion Walk shopping centre
- Investment in bringing new retailers to Culver Square
- Traffic changes both implemented in March 2013 and planned for the future such as the St Botolph's roundabout
- The new Magistrates Court
- The St Botolph's Quarter development
- The Walls project
- Events such as the Big Screen: (est £250k) a new attraction for Colchester
- The Waiting Room: a community space with a comprehensive event programme, opened in 2013.
- The George Hotel has been taken over and will be completely refurbished starting 2016
- Surya/Flying Trade proposals for new café and museum in Museum Street
- Increasing number of residential properties in the town centre above shops, which add to the diversity and mix in the town centre.

4.13 An unknown sum has also been invested in the Town centre on refurbishments to provide new and improved restaurants:

- Hudsons: New restaurant/club opened December 2014.
- Bills: new family restaurant opened in the High Street July 2015
- The Church Street Tavern – opened in Spring 2014 to rave reviews (The Independent 4.4.15)

- The Three Wise Monkeys – this former member only night club is now a Tap House, restaurant and live music venue set over three floors. Opened in Dec 2013 with full opening in Feb 2014.
- El Guaca – Mexican restaurant opened in 2014 in the former 'Layer Cake' premises transforming a problem bar into a family restaurant
- Love Thy Burger – opened in 2015
- Pizza Express – undergone a complete refurb in 2014
- Aburi – a new Japanese restaurant opened in September 2015 in Short Wyre Street
- Piattos – a new Salsa Café opened in September 2015 in Queen Street
- Tysa Desserts & Coffee – late night café opened in September 2015 in the High Street
- Carluccios Restaurant – opened within Williams & Griffin (Fenwicks) dept store October 2015.
- Hunt & Darton Café at Firstsite Gallery – (June 2015). Opened as the only café art installation in the country (temporary basis as H&D also perform at other events like the Edinburgh Festival)
- The Cells at the old Magistrates' Court – opened in August 2015 as part of the
- Memoirs Restaurant, which opened in 2014

4.16 Since the previous committee two further representations have been received which are relevant to matters concerning the Town Centre. The first letter has been received from Historic England who support "a plan-led approach to the management of development in any given area, and proposals that are contrary to an adopted plan should only be approved in exceptional circumstances, and where they would result in a clear, discernible public benefit that demonstrably outweighs any consequential harm. In this instance we are not aware of any such public benefits that would justify town centre uses (including a cinema) in this location.

4.17 The second letter was received from Aquila Developments Ltd. The letter urges members "to consider very seriously the effects on Colchester Town Centre of this very damaging scheme at Tollgate which goes so far beyond what should reasonably be permitted at a District Centre as to represent a real challenge to the existing retail order... In the real world it represents a real threat to existing, committed and planned Town Centre investment. ... in the event it were to be permitted we (Aquila) would not actively seek development opportunities in Colchester Town centre in the foreseeable future."

4.18 Copies of both letters are attached as appendices to this report.

5.0 Financial and Procedural Implications of Approving the Application

5.1 Implications of Judicial Review – financial and other costs

There are a variety of legal obligations which public bodies have to follow when making decisions and a failure to do so renders any subsequent decision potentially unlawful and vulnerable to challenge. This is also the case in planning decisions – section 38(6) of the Planning & Compulsory Purchase Act 2004 prescribes that applications must be determined in accordance with the development plan unless material considerations indicate otherwise. If a decision that departs from the

development plan is contemplated then clear and convincing material planning considerations are required. There are also key procedures set out in statutory instruments ('orders') that must be followed to prevent any decision taken being legally flawed and vulnerable to challenge.

- 5.2 Judicial review is a process by which the courts review the lawfulness of a decision made (or sometimes lack of a decision made or action taken or sometimes failure to act) by a public body. It is mechanism by which a judge considers whether a public body has acted in accordance with its legal obligations and if not, can declare a decision taken by it invalid. From 1 July 2013 judicial review of planning cases must be started within a strict deadline of 6 weeks from the date of the decision under section 288 of TCPA 1990.
- 5.3 Either party can appeal against the court's decision to the court of appeal. However, the Judge hearing the case has to be asked for permission to appeal. If it is refused an application has to be made to the court of appeal within 14 days of the administrative court's decision. Judges usually refuse permission to appeal, and one has to apply to the Court of Appeal directly for permission.
- 5.4 The associated financial cost of bringing judicial review claims can be very high as all parties need to be represented by costly specialist barristers, especially where a case proceeds to a full court hearing and the claimant is unsuccessful. This is because if unsuccessful, the claimant is likely to be ordered to pay the defendant's costs as well as their own. If the claimant is successful then the defendant will be ordered to pay their costs. However, that leaves the defendant costs should the claim be unsuccessful. Legal costs can be high given that this is a very specialist area of law usually requiring representation by senior counsel or QC's.
- 5.5 In judicial review proceedings of planning decisions the court will usually intervene as a matter of discretion to quash a decision. The court cannot rule on the policy merits of a decision, only in order to right a recognisable public wrong. If an application for judicial review is successful the court can grant to the claimant a Quashing order where the original decision is declared invalid and is struck down and the public body has to take the decision again.
- 5.6 Arguably the greatest impact of this court process is delay, uncertainty and cost to developers. There have been a number of judicial reviews which have resulted in considerable delay to development projects, including infrastructure, housing, retail and residential developments.
- 5.7 In conclusion, the principal risks associated with judicial review relate to the uncertainty and delay that a decision may be quashed with the award of costs against the unsuccessful party. These costs can be significant.
- 5.8 If a decision is quashed then the lpa may consider a new application afresh and address the flaws identified by the Court in the previous decision making process. In itself, the threat of judicial review should not be seen as a material planning consideration in the determination of the application either way. However, departure from the adopted and up-to-date local plan requires robust material planning considerations to justify setting aside the policy framework and in the absence of such a justification, any decision could be considered vulnerable to successful court challenge.

- 5.9 In this particular case if the Council approved planning permission an aggrieved third party might seek to challenge the decision if in their opinion a legal mistake had been made by the Council when reaching the decision to approve and they could evidence this. - this might include, for example, that the Local Authority failed to take into account opinions put forward (this does not mean that the Council has to agree with them), had undue regard to matters that were not material planning considerations, had not had due regard to material planning considerations, that the procedure in dealing with the application was flawed, that a Councillor failed to declare an interest
- 5.10 In the event of a refusal of permission you might normally expect the applicant to appeal the decision but a third party could seek to challenge the refusal via a JR if they believed a legal mistake had been made

5.11 *[Officer comment:]*

The question here for the Council is that decision on a sound legal basis having had proper regard to all material factors and/or followed all appropriate procedure and/or all interests had been properly declared. That is what it is essential that the officers report is thorough and that the Committee in reaching its decision clearly provides justifiable reasons for reaching that decision. This is particularly important where the Committee looks to overturn a recommendation where a major departure from policy would result –such as in this particular case.

In a situation where a major plank of Council retail and employment planning policy is being overturned it opens the door to third parties to challenge that decision if it can be demonstrated that decision was reached without due regard to those policies. A number of Town Centre retailers have made representations objecting to the proposed development on the grounds it is contrary to local and national planning policy. It is therefore important that any decision to approve that development can be properly justified if a JR is to be successfully resisted.

5.12 Departures from the Development Plan and 'call-in' for determination by the Secretary of State

A departure application is a planning application that is not in line with, or 'departs from', the development plan in force in the area where the application is being made. It used to be the case that the Secretary of State had to be notified if a local planning authority intended to approve a departure application.

- 5.13 In April 2009 a new circular and direction, The Town and Country Planning (Consultation) (England) Direction 2009, came into force which defined which applications local authorities must notify the Secretary of State of. This direction removed the need for local authorities to inform the Secretary of State if they intend to approve a departure application.
- 5.14 The 2009 Direction does still require local planning authorities to notify the Secretary of State before approving certain types of very significant development.

5.15 Even though local planning authorities no longer have to inform the Secretary of State about all departure applications they intend to approve, these applications have to be publicised locally more than other types of application. When a local authority receives a departure application, it must:

- display a notice at the development site for at least 21 days
- place an advertisement in the local newspaper

(Article 13 of the Town & Country Planning (Development Management Procedure) Order 2010).

5.16 Section 77 of the Town and Country Planning Act 1990 is also relevant. It provides that the Secretary of State may direct that any particular planning application should be called in for determination, irrespective of whether it falls within the terms of the new direction, having regard to the policy on call-in. This Direction shall apply in relation to any application for planning permission which is inter-alia for development outside town centres defined as “development outside town centres” means development which consists of or includes retail, leisure or office use, and which – (a) is to be carried out on land which is edge-of-centre, out-of-centre or out-of-town; and (b) is not in accordance with one or more provisions of the development plan in force in relation to the area in which the development is to be carried out; and (c) consists of or includes the provision of a building or buildings where the floor space to be created by the development is 5,000 square metres or more. The Direction requires ‘Where a local planning authority does not propose to refuse an application for planning permission to which this Direction applies, the authority shall consult the Secretary of State (SoS). In the event that members resolve to grant planning permission then the SoS will need to be notified in accordance with the provisions of the 2009 Direction’. The SoS may then decide to call-in the application and a local inquiry would then be held under the direction of a planning Inspector who would report directly to the SoS; who retains the discretionary power to determine the application.

5.17 This process could result in considerable delay and uncertainty for investors and could have considerable implications for the local plan. There are considerable direct costs associated with hosting and staffing a complex inquiry (in excess of £100K) with expert witnesses and advice from specialist senior counsel. These are similar to those associated with an appeal against refusal under section 38 of the 1990 Act. The financial costs should not be seen as a material consideration and should not be afforded weight in the determination of an application. The Tollgate proposals were advertised as a departure in accordance with the relevant regulations and due procedure has been followed.

5.18 Appeals under s.38 of the Town & Country Planning Act

If members are minded to refuse the application in accordance with the Officer recommendation then the applicants would have resort to appeal. Given the level of public interest, this is likely to be via a public inquiry hosted by the Borough. An Inspector appointed by the Secretary of State would then determine the application in due course (unless ‘recovered’ by the SoS for determination). The costs associated with a large public inquiry are considerable (in excess of £100k) given the essential input required from expert witnesses and legal representation. This is not a material consideration in the determination of the application.

- 5.19 As members will appreciate the cost of mounting a defence at appeal is a legitimate cost of democracy. Members should not approve an application merely to avoid the high cost of an appeal if they feel such a refusal is justified - the Council has ways of funding such appeals as a contingency.
- 5.20 The important question for the Committee when refusing an application is "Is it acting reasonably in doing so. If an appellant can demonstrate that the Council acted unreasonably he/she can seek to recover appropriate costs from the Council. The appeal inspector would consider claims for costs on their merits. Local planning authorities can also seek to recover costs from appellants where they have acted unreasonably.
- 5.21 NPPG paragraph 031 advises that costs may be awarded where:-
- a party has behaved unreasonably; and
 - the unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process.
- 5.22 This poses the question – "What does 'unreasonable' mean?"
- 5.23 Again the NPPG provides helpful advice in paragraph 032 when it states

"The word "unreasonable" is used in its ordinary meaning, as established by the courts in Manchester City Council v SSE & Mercury Communications Limited [1988] JPL 774.

Unreasonable behaviour in the context of an application for an award of costs may be either:

- procedural – relating to the process; or
- substantive – relating to the issues arising from the merits of the appeal.

The Inspector has discretion when deciding an award, enabling extenuating circumstances to be taken into account."

- 5.24 Further clarification is provided by paragraph 033:-

"An application for costs will need to clearly demonstrate how any alleged unreasonable behaviour has resulted in unnecessary or wasted expense. This could be the expense of the entire appeal or other proceeding or only for part of the process.

Costs may include, for example, the time spent by appellants and their representatives, or by local authority staff, in preparing for an appeal and attending the appeal event, including the use of consultants to provide detailed technical advice, and expert and other witnesses.

Costs applications may relate to events before the appeal or other proceeding was brought, but costs that are unrelated to the appeal or other proceeding are ineligible.

Awards cannot extend to compensation for indirect losses, such as those which may result from alleged delay in obtaining planning permission.”

5.25 Officer comment:

Officers do not consider that the recommendation to refuse permission contained in this report exposes the Council to a serious claim for a costs award at appeal as it is based solidly on strong policy grounds. In terms of the question of prematurity the Council is able to support its claim that the application is significant and will harm the economic prospects of the Town Centre and is strongly contrary to local and national planning policy/guidance. The Council is also able to evidence why approving the proposed development ahead of adopting a new Local plan would be prejudicial to the planning process in a plan-led system.

6.0 Consultation responses received since 17 December 2015

- 6.1 The Council has received a letter from Historic England in respect of the Tollgate Village application and its possible impact on the heritage assets in the Town Centre and Aquila a developer who objects. These are reported in the section of the Supplementary Report which deals with the Town Centre.

[officer comment]:

It is interesting to note that the Historic England letter places an interesting focus on the significance of investment and vitality and how it also sustains, almost as a by-product, the physical fabric of an historic town centre. It is rare for Historic England to make such a representation and it highlights the extent of their concern that they have done so and the extent to which they wish the Council to consider the wider impacts of under-investment in terms of the unforeseen consequences that could follow for the nationally important heritage assets within Britain's Oldest Recorded Town. It is noted that the letter refers to concern about possible longer-term vacancies. The Council's retail consultant has indicated that in his view the number of vacancies that will arise in the town centre will be low as a consequence of the Tollgate Village proposal.

- 6.2 As of 4 February 2016 a further 6 letters had been received since the Committee considered the application on 17 December 2015. Each expressed support for and welcomed the Tollgate Village proposal. No new material issues were raised that have not been previously reported.

7.0 Suggested Conditions and Heads of Terms

If members are minded to approve the application, a list of conditions is suggested as being appropriate in the circumstances to provide:-

1. A framework within which the merits of subsequent reserved matters applications following the grant of outline planning permission can be assessed; and ,
2. Provide the Council with control over the subsequent details (via Reserved Matters submissions) - the Committee having agreed the principle of the development as being justifiable as an exceptional departure. These will include a range of 'prior to commencement' ; 'prior to beneficial use occurring' and a number of 'restrictive' conditions

Included below is also a list of suggested heads of Agreement that members may feel are appropriate to mitigate the impacts of the development. . All have been agreed with the Applicants except those shown in italics. These are explored first.

7.1 Draft S106 requirements

As requested by the Committee on 17 December 2015 Place Services and the applicants have been exploring potential s106 contributions designed to mitigate impact of the proposal were it to be approved. Government guidance on the use of planning obligations is clear that they cannot be used to make an unacceptable proposal acceptable and that they cannot be used to buy a planning permission.

7.2 The Council must when requiring planning obligations be able to demonstrate that they pass the Governments three tests of reasonableness. Known as the C.I.L. tests after the Community Infrastructure Levy Regulations 2010 which set them out in paragraphs 122 & 123.

7.3 Obligations can be used to:-

- restrict the development or use of the land in any specified way
- require specified operations or activities to be carried out in, on, under or over the land
- require the land to be used in any specified way; or
- require a sum or sums to be paid to the authority (or, to the Greater London Authority) on a specified date or dates or periodically.

And can only be required where they are:-

- necessary to make the development acceptable in planning terms
- directly related to the development; and
- fairly and reasonably related in scale and kind to the development

7.4 Currently the obligations identified are as follows:-

(1)

Contribution of (a) £24,000 + (b) £1000 pa to the Council to provide for (a) litter picking and bin emptying in vicinity around Tollgate Village + (b) fuel, bags, equipment, ppe and waste disposal. (for an initial period of 10 years); or,

a binding commitment from the developer to provide this service through the wider Tollgate Village maintenance contract.

CIL test comment:

This is considered to pass the CIL tests in that with a significant number of A3-A5 uses and large areas of public realm litter could become a nuisance beyond the site even with comprehensive management within the development. It is required to make the development acceptable in planning terms as it provides a mechanism to tackle environmental and amenity nuisance generated by it.. ie wind-blown litter and dropped litter beyond the Tollgate Village boundary. As a result the requirement is related to the development and the 'either or' option for delivery ensures that scale is reasonably related so long as parties can agree the

extent of the area to which the 'beyond the boundary' litter picking applies . Clearly the further the distance the less reasonable it is likely to be. It would also be unreasonable if the Council could not justify the size of the costs as being directly related to the tasks being undertaken and the frequency with which they are being delivered or the area over which that service is being provided. The figures have been provided by Operational Services.

(2)

(As required by Highways England [HE])

Highway's England has indicated that they will require the developer to implement all the agreed highway mitigation works (A12) prior to any part of the development coming into use. The applicants have asked for an alternative option which allows them to make an agreed financial contribution to Highway's England who will then implement the works themselves or use the funding to implement a wider improvement scheme. The applicants have asked that in the event of this option being triggered they be allowed to open the development prior to the highway works being implemented by Highways England.

Highways England have indicated they have no objection in principle to the applicant delivering the required improvements prior to the opening of the Tollgate Village development but have some concern that if a financial contribution alternative is made and the development opened before Highway's England has secured agreement to add the works to their programme then highway safety issues could arise.

Highways England is looking to agree a form of wording that requires physical delivery but if a financial contribution is to be acceptable then they need a form of wording that allows it only to be triggered if Highways England is able to deliver the improvements within an identified programme that is near enough (in terms of delivery date) to the projected opening of Tollgate Village as to minimize any disruption to and congestion on junction 26. Work on wording is in progress.

(3)

(As required by Essex County Council [ECC] as local highway authority

Funding for travel plan and public transport improvements). Grampian conditions will be used to secure highway improvements. All works will need to be in place prior to opening.

(4)

Commitment to local recruitment and training. ('Recruitment Scheme')

Sample

Tollgate Partnership covenants and undertakes to the Council as follows as follows:

"Recruitment Scheme" means a scheme establishing the details of a partnership between TP the Council and Job Centre in relation to all aspects of selection of candidates for interview for all employment vacancies and opportunities at the Development including the provision by TP or their potential occupiers of agreed pre- interview training of prospective interview candidates and for the avoidance of doubt the decision as to who to employ at the Development rests solely with TP or their occupiers

2. TP covenants with and undertakes to the Council:

2.1. no less than 6 months before the opening of any part of the Tollgate Village Development to:-

2.1.1 prepare the Recruitment Scheme and

2.1.2 submit the Recruitment Scheme to the Council for approval

2.2 Not to Occupy any part of the Development prior to

2.2.1 the inclusion in the Recruitment Scheme of such amendments as the Council shall reasonably require and

2.2.2 receiving the approval in writing by the Council of the Recruitment Scheme

2.3 To operate the Recruitment Scheme in relation to all employment vacancies and opportunities at the Development for the Life of the Development

CIL test comment

This type of initiative was successfully employed on the replacement Sainsbury Store at Tollgate with the Tollgate Partnership & Sainsbury's and also with Waitrose on St Andrews Avenue. In a situation where employment land is being lost it is right to work with the developer to offer skills training to those locally who are currently unemployed or school leavers in the hope that it enhances the chances of them benefitting from the development which is itself a departure from the Local Plan and the new jobs it offers. It is acceptable in planning terms in that it potentially offers local people enhanced opportunities for employment and therefore helps to promote some degree of sustainability. It is directly related to the development and is reasonable in scale and is unlikely to cost the developer financially.

(5)

Commitment that any retailer with a Town Centre presence at the time of issuing the planning permission who then wishes to open a store at Tollgate Village that the Town Centre unit will be retained, open and trading for at least 4 years after the completion of the relevant unit.

CIL test comment

This is a requirement often used across the Country to try and ensure that a development that will adversely and significantly impact Town Centre retailing is constrained in that impact in its early years by preventing 'poaching' and evacuation of traders from the Town Centre by retailers attracted 'out of town'. In some ways it is a blunt instrument in that whilst an operator can make a commitment to retain a town centre presence (as well as open a new store elsewhere) it is very difficult for the Council to enforce this. This is because it could be held as unreasonable for a Council to require a trader to keep open a loss making store and the Council cannot reasonably force a building owner to extend a lease to a retailer for a limited period in order to comply with a commitment to retain a town centre presence. The requirement will be difficult to apply to a subsequent tenant of the Tollgate Village Development in any event as that trader will not be a signatory to the Agreement. It would rely on the owner of the Tollgate Village development not leasing a unit/s to a retailer who

could not demonstrate that they have a lease with 4 years left to run on their town centre premises.

The value of this requirement is questioned in practice. It is perhaps window dressing designed to soften the apparent possible impact of the development on the Town Centre. It is however a statement of intent by Tollgate Partnership who would have to be trusted to deliver on the commitment even where this may be against their immediate financial & commercial interest (for those four years after the completion of each individual unit))

(6)

Financial contribution of £50,000 to Colchester Borough Council for each of 5 consecutive years from a date 6 months prior to the opening of the first phase of the Tollgate Village development towards the promotion of the Town Centre as a sub-regional retail centre and for visitor initiatives.

C.I.L test comment:

It is required to make the proposal acceptable in that the Committee in determining the application with a view to granting planning permission has identified that it will have an impact on the Town Centre but that impact is less than that identified by officers and the Council own retail consultant. Members have judged that if that impact is to be minimized in the interest of retaining a viable and vital town centre then the Tollgate Village development must look to support the town centre and the adopted retail hierarchy. This support can be expressed by contributing financially to the promotion of the Town Centre during the early years of the Tollgate Village development trading.

In this sense it is directly related to the development and its impacts and represents a sensitive response to mitigation. The scale of the sum required is considered reasonable and appropriate in scale and is a relatively modest annual contribution compared to the overall size of the investment at Tollgate and its projected turnover.

Whilst modest in nature it will allow for a broad range of promotional activity that will help to keep the Town Centre and what it offers to the fore of the public's mind

(7)

Extension of CBC CCTV coverage to Tollgate with a financial contribution

C.I.L test comment:

It is expected that the Tollgate Village development will have its own CCTV management system within the site for obvious security and safety reasons. The development is likely to attract significant new footfall to Tollgate and this would extend late into the evening. If the development is to attract significant visits by non-car mode it is reasonable to expect the developer to contribute to extending the Town's CCTV coverage to include the vicinity around the development. This will enhance community safety and potentially encourage people to walk & cycle to the site. The extent to which the system needs expanding and the identification of a reasonable sum that relates to the scale of development has yet to be agreed. It may also be possible to link the Tollgate Village system to the Council's system thereby extending the comprehensiveness of coverage

(8)

A financial contribution towards expansion of the existing community hopper bus service. Currently the quoted figure put to the applicant is:-

£25,028pa for each of 10 consecutive years (Total over the 10 years = £250,028) to fund the running running two return journeys on two days

C.I.L. test comment:

The contribution is required to make the development acceptable in that the applicant's have strongly argued that facilities will be well used by local people and that the development is sustainable. Whilst the site is served by a number of bus routes that radiate to and from main urban centres. Within the local community there are those whose access to local facilities is restricted by circumstance including lack of a car or disability, The current bus routes are not always close enough or frequent enough to offer support for some in the local community. Mini-cab fares may be prohibitively high for others. Fortunately Stanway is served by a rudimentary community bus service provided by Colchester Community Volunteer service (CCVS). A development of the scale proposed at Tollgate is the type of proposal that can reasonably be expected to enhance accessibility and enhance non-car access particularly for individual /groups who are already disadvantaged or isolated. Some initial research has been undertaken and preliminary discussion with the applicants has proved positive. Currently the contribution suggested is

(9)

Villa Road footpath improvements

C.I.L. test comment:

The Council is currently exploring who owns the embankment on the east side of Tollgate Road because it would be reasonable to require the Tollgate Village development to pay for the improvement of the pedestrian link between Villa Road and shops at Tollgate. The overall Vision for Stanway promotes enhanced accessibility and linkage for pedestrians/cyclist and there is no doubt that a retail leisure development such as that proposed in the shape of Tollgate Village will attract customers from the existing residential neighbourhood to the east. The improvement of the current sub-standard, steep stepped link up/down the embankment is fully justifiable from an access and safety perspective and relates directly to the added attraction of the site that will be generated by the range of facilities on offer. It may also encourage local people to leave their car at home and walk to the site.

Additional work is required to resolve how best an enhanced link can be provided and the extent to which the applicants can be expected to finance the work but what appears clear is that the land is not within the ownership of the applicants. Therefore if the landowners co-operation cannot be secured it will not be possible to require the applicant to make the required improvements. If the owner of the land turns out to be O&H who are developing parts of Lakelands they may wish to freely co-operate as improvement of the link will benefit residents buying into Lakelands who wish to access schools and other facilities to the east

8.0 Draft Conditions

1.

No development shall be commenced until plans and particulars of "the reserved matters" referred to in the below conditions relating to the APPEARANCE, LANDSCAPING, LAYOUT, (Including the DISTRIBUTION OF USES hereby permitted) , AND SCALE, have been submitted to and agreed, in writing, by the Local Planning Authority. The development shall be carried out in accordance with the approved details.

Reason: The application as submitted does not provide sufficient particulars for consideration of these details.

2.

Application for approval of the reserved matters shall be made to the Local Planning Authority before the expiration of three years from the date of this permission.

Reason: To comply with the requirements of Section 92 of the Town and Country Planning Act 1990 as amended by the Planning and Compulsory Purchase Act 2004.

3.

The development hereby permitted shall be begun before the expiration of two years from the date of approval of the last of the reserved matters to be approved.

Reason: To comply with the requirements of Section 92 of the Town and Country Planning Act 1990 as amended by the Planning and Compulsory Purchase Act 2004.

4.

Details of Reserved Matters shall generally accord with the Parameter Plans and Design Principles (amended March 2015)

Reason: For the avoidance of doubt as to the scope of this permission and in the interests of proper planning.

(Note: need to qualify the detail shown for development zone 3)

5.

No works shall take place in any Development Zone until detailed scale drawings by cross section and elevation that show the development of that zone in relation to adjacent property, and illustrating the existing and proposed levels of the site, finished floor levels and identifying all areas of cut or fill, have been submitted to and agreed, in writing, by the Local Planning Authority. The development shall thereafter be completed in accordance with the agreed scheme before each of the relevant Development Zones is first occupied.

Reason: In order to allow more detailed consideration of any changes in site levels where it is possible that these may be uncertain and open to interpretation at present and where there is scope that any difference in such interpretation could have an adverse impact of the surrounding area.

6.

No works shall take place in any Development Zone until precise details of the manufacturer and types and colours of the external facing and roofing materials to be used in construction for that Zone have been submitted to and approved, in writing, by the Local Planning Authority. Such materials as may be approved shall be those used in the development.

Reason: In order to ensure that suitable materials are used on the development as there are insufficient details within the submitted planning application.

7.

Prior to the first occupation of the development hereby permitted in any Development Zone, refuse and recycling storage facilities for that Zone (including those located within other zones but serving the Zone in question) shall be provided in accordance with a scheme which shall have been previously submitted to and agreed, in writing, by the Local Planning Authority. Such facilities shall thereafter be retained to the satisfaction of the Local Planning Authority at all times.

Reason: The application contains insufficient information to ensure that adequate facilities are provided for refuse and recycling storage and collection.

8.

Prior to the first occupation of the development hereby permitted in any Development Zone, equipment, facilities and other appropriate arrangements for the disposal and collection of litter for that zone (including those located within other zones but serving the Zone in question) shall be provided in accordance with details that shall have previously been submitted to, and agreed in writing by, the Local Planning Authority. Any such equipment, facilities and arrangements as shall have been agreed shall thereafter be retained and maintained in good order.

Reason: In order to ensure that there is satisfactory provision in place for the storage and collection of litter within the public environment

9.

No works whatsoever shall commence within any Zone until a scheme to deter the removal of trolleys from the site has been submitted to and approved, in writing, by the Local Planning Authority. The scheme shall then be implemented as approved prior to the commencement of the first use of the development hereby permitted within that Zone (including those located within other zones but serving the Zone in question) and retained as such thereafter.

Reason: To retain trolleys on site and deter the unnecessary displacement of any trolley from the site that may lead to abandonment elsewhere, in order to avoid any detrimental impacts on the neighbouring areas.

10.

The Class A1, A2, A3 A4 A5 floorspace hereby permitted shall not exceed 24,122 sq.m. gross. Notwithstanding this the maximum floorspace within individual use classes shall not exceed:-

- Class A1 comparison goods: 21,314 sq.m. gross / 14,290sq.m net for for the avoidance of doubt includes flexible A1 floorspace set out below
- Class A1 convenience goods 1,858sq.m. gross / 1394sq.m. net
- Class A3, A4 and A5 floorspace shall not exceed 2,100 sq.m gross
- The Class D2 floorspace hereby permitted shall not exceed 6,690sq.m.

11.

Control over unit size maxima and/or minima to be formulated that allows small local shops within the cluster on the north side of Tollgate West immediately adjacent to the new pedestrian corridor.

Note - to be developed and presented at the meeting.

12.

Notwithstanding the definition of development the creation of any mezzanine level or intermediate floorspace within any building or part of a building within this development is not permitted without the further grant of planning permission for an expansion of floorspace from the local planning authority.

Reason: In assessing the merits of this development the Council has had careful regard to retail impact and highway impact. The Council therefore wishes to ensure that any addition to the overall total floorspace within the development, notwithstanding the restrictions contained in condition 10 above, is subject to control in order that the wider retail and highway impacts of that floorspace can be properly assessed and where appropriate and/or possible mitigated before that floorspace is constructed. All of this is in the wider interest of safeguarding the viability and vitality of the Town Centre and in the interest of safeguarding highway safety and the efficiency of the local and trunk highway networks.

13.

No demolition or construction work shall take outside of the following times;

Weekdays: 08.00 to 18.00hrs

Saturdays: 09.00 to 13.00hrs

Sundays and Bank Holidays: none

Reason: To ensure that the construction phase of the development hereby permitted is not detrimental to the amenity of the area and/or nearby residents by reason of undue noise at unreasonable hours.

14.

The use hereby permitted shall not BE OPEN TO CUSTOMERS outside of the following times:

Weekdays: 07.00-23.00

Saturdays: 07.00-23.00

Sundays and Public Holidays: 09.00-22.00

Reason: To ensure that the development hereby permitted is not detrimental to the amenity of the area and/or nearby residents by reason of undue noise including from people entering or leaving the site, as there is insufficient information within the submitted application, and for the avoidance of doubt as to the scope of this permission.

15.

No deliveries shall be received at, or despatched from, the site outside of the following times:

Weekdays: 07.00 to 20.00

Saturdays: 07.00 to 20.00

Sundays and Public Holidays: 09.00 to 20.00

Reason: To ensure that the development hereby permitted is not detrimental to the amenity of the area and/or nearby residents by reason of undue noise including from delivery vehicles entering or leaving the site, as there is insufficient information within the submitted application, and for the avoidance of doubt as to the scope of this permission.

16.

Prior to the first use of the development hereby permitted, control measures shall be installed in accordance with a scheme for the control of fumes, smells and odours and noise attenuation to external plant that shall have been previously submitted to, and agreed in writing by, the Local Planning Authority. Where appropriate this scheme shall be in accordance with Colchester Borough Council's Guidance Note for Odour Extraction and Control Systems. Such control measures as shall have been agreed shall thereafter be retained and maintained to the agreed specification and working order.

Reason: To ensure that there is a scheme for the control of fumes and odours in place so as to avoid unnecessary detrimental impacts on the surrounding area and/or neighbouring properties, as there is insufficient detail within the submitted application.

17.

No works shall take place, including any demolition, until a Construction Method Statement has been submitted to and approved, in writing, by the Local Planning Authority. The approved Statement shall be adhered to throughout the construction period and shall provide details for:

- the parking of vehicles of site operatives and visitors;
- storage of plant and materials used in constructing the development;
- the erection and maintenance of security hoarding including decorative displays and facilities for public viewing, where appropriate;
- wheel washing facilities;
- measures to control the emission of dust and dirt during construction; and
- a scheme for recycling/disposing of waste resulting from demolition and construction works.
- routing for vehicles delivering construction materials
- location of compounds
- health & safety measures to protect public during construction
- methodology for breaking up concrete slab and crushing
- noise suppression measures
- arrangements for exceptional events
- arrangements for the display of contact details on site in prominent locations for the public to report issues to the site manager

Reason: In order to ensure that the construction takes place in a suitable manner and to ensure that amenities of existing residents are protected as far as reasonable and in order to ensure that publicity can be given to the public (especially school children) as to which local routes to avoid in order miss additional hgv traffic.

18.

No works shall take place within any Development Zone until full details of all landscape works have been submitted to and agreed, in writing, by the Local Planning Authority and the works shall be carried out prior to the occupation of any part of the development unless an alternative implementation programme is subsequently agreed, in writing, by the Local Planning Authority. The submitted landscape details shall include:

- PROPOSED FINISHED LEVELS OR CONTOURS;
- MEANS OF ENCLOSURE;
- CAR PARKING LAYOUTS;

- OTHER VEHICLE AND PEDESTRIAN ACCESS AND CIRCULATION AREAS;
- HARD SURFACING MATERIALS;
- MINOR ARTEFACTS AND STRUCTURES (E.G. FURNITURE, PLAY EQUIPMENT, REFUSE OR OTHER STORAGE UNITS, SIGNS, LIGHTING ETC.);
- RETAINED HISTORIC LANDSCAPE FEATURES;
- PROPOSALS FOR RESTORATION;
- PLANTING PLANS;
- WRITTEN SPECIFICATIONS (INCLUDING CULTIVATION AND OTHER OPERATIONS ASSOCIATED WITH PLANT AND GRASS ESTABLISHMENT);
- SCHEDULES OF PLANTS, NOTING SPECIES, PLANT SIZES AND PROPOSED NUMBERS/DENSITIES WHERE APPROPRIATE; AND
- IMPLEMENTATION TIMETABLES.

Reason: To ensure that there is a suitable landscape proposal to be implemented at the site for the enjoyment of future users and also to satisfactorily integrate the development within its surrounding context in the interest of visual amenity.

19.

Prior to the first occupation of the development within any Development Zone, a landscape management plan including long term design objectives, management responsibilities and maintenance schedules for all landscape areas for that Zone shall be submitted to and agreed, in writing, by the Local Planning Authority. The landscape management plan shall thereafter be carried out as approved at all times.

Reason: To ensure the proper management and maintenance of the approved landscaping in the interests of amenity and the character and appearance of the area.

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Contamination Condition

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Prior to the first occupation of the development within any Development Zone, the vehicle parking area indicated on the approved plans for that Zone , (including those located within other zones but serving the Zone in question) including any parking spaces for the mobility impaired, shall have been hard surfaced, sealed, marked out in parking bays and made available for use to the satisfaction of the Local Planning Authority. The vehicle parking area shall be retained in this form at all times and shall not be used for any purpose other than the parking of vehicles that are related to the use of the development.

Reason: To ensure that there is adequate parking provision to avoid on-street parking of vehicles in the adjoining streets in the interests of highway safety.

22.

Prior to the commencement of the development within any Development Zone, details of the number, location and design of cycle parking facilities shall be submitted to and approved, in writing, by the Local Planning Authority. The approved facility shall be secure, convenient and covered and shall be provided prior to occupation within that Zone (including those located within other zones but serving the Zone in question) and retained for that purpose at all times thereafter.

Reason: To ensure appropriate cycle parking is provided in the interest of highway safety.

23.

Prior to the commencement of development within any Development Zone the areas within that Zone for the purpose of loading, unloading and manoeuvring of all vehicles including construction traffic, as well as a timetable for their implementation, (including those located within other zones but serving the Zone in question) shall have been submitted to and approved, in writing, by the Local Planning Authority. The areas for loading, unloading and manoeuvring shall then be provided in accordance with the agreed details for that Zone and shall be retained at all times for that sole purpose thereafter.

Reason: To ensure that appropriate loading, unloading and manoeuvring facilities are available in the interest of highway safety.

24.

No works shall take place until a scheme for the phasing of construction work has been submitted to and approved, in writing, by the Local Planning Authority. The development shall thereafter be carried out in accordance with the approved phasing scheme.

Reason: To limit the local impact of construction work in the interests of the amenities of the surrounding area.

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No part of the development hereby permitted shall be brought into beneficial use until a Site Management and Security Plan has been agreed in writing with the local planning authority. This plan shall include a description of:-

- CCTV coverage and monitoring arrangements
- On-site security presence
- Methods for securing the site (particularly the car parking areas) outside of business hours
- Litter control and site cleaning
- Public realm maintenance

Reason: In order that the Council be satisfied that the site will not pose a risk to community safety or result in unacceptable anti-social behaviour during the hours that the site is not in use. The Council is particularly concerned that the large areas of car parking are not open when the site is not in use as there has been some experience of such areas being misused at night

9.0 CONCLUSIONS RECOMMENDATION (following Supplementary Report considerations) 18 February 2016

- 9.1 Having provided and fully considered the additional information requested by Members as set out in this Supplementary Report officers remain of the opinion that the proposal is unequivocally unacceptable and should be refused on the grounds previously recommended.

10.0 RECOMMENDATION (following Supplementary Report considerations) 18 February 2016

10.1 REFUSE planning permission for the reasons set out below.

1. Conflict with site allocation as a Strategic Employment Zone

A significant part of the application site is allocated in the Adopted Local Plan as a Strategic Employment Zone (policies CE1, CE3, SA STA3 and DP5). The proposed uses are not in conformity with the provisions of the local plan and the loss of this important high quality Adopted Strategic Employment Zone (SEZ) land is considered prejudicial to the Council's overall employment strategy to the detriment of the medium to long- term economic benefit of the town. It is important to maintain a range of different quality sites available to the market. Notwithstanding that the proposed development will generate new jobs in the service and hospitality sectors the proposal would erode the integrity and future attractiveness of The Tollgate SEZ for business park development that requires excellent access to the Nation's strategic trunk road system. This concern is further compounded by the fact that Stanway is expanding rapidly through planned housing delivery and the Strategic Employment Site offers potentially sustainable employment opportunities for residents who are otherwise forced to travel in search of job opportunities.

This site and its wider hinterland is allocated in the Council's Adopted Core Strategy - Policy SD1 as the Stanway Growth Area (SGA) where development is expected to be focused and where proposals that accord with other policies in the Local Plan will be approved without delay. In defining the Stanway Strategic Employment Zone, within which the application site lies, the Council identified the type of development that would be appropriate to achieve its medium to long- term economic objectives within Table CE1b (as supports employment classification and hierarchy policy CE1 and the strategic designation provided by table CE1a). These appropriate uses are defined as B1b research and development, studios, laboratories, hi-tech; B1c light industry; B2 general industry; and B8 storage and distribution. Secondary land uses are described as B1a offices; C1 hotels, D2 assembly and leisure and sui generis. The proposed land uses comprising A3 or A4 uses do not comply with that policy. The proposed development on this strategically important Employment Zone would seriously undermine the Council's ability to plan for the medium to long term expansion of the Town's economy to create sustainable high value jobs in locations that complement areas experiencing rapid and significant housing growth and with excellent access to the strategic highway network. The Council's carefully planned employment strategy is reinforced within its Adopted Site Allocations (2010) in so far as Policy SA STA1 and SA STA 3 that make provision for employment use (which exclude those proposed here) and reject the need for town centre uses as proposed.

2. Conflict with retail hierarchy policy and Urban District Centre (UDC) policy

A large part of the application falls outside of the designated Urban District Centre and proposes a significant expansion of retail and town centre use floorspace outside of the defined UDC contrary to Policy CE2b of the Adopted Core Strategy (revised July 2014). It is the Council's opinion that the scale and type of retailing and town centre uses proposed is of an order of scale that would effectively make Tollgate a sub-regional retail/leisure attractor that will inevitably harm Colchester's Town Centre at the apex of the Adopted retail hierarchy as the pre-eminent sustainable destination for such activity within the Borough and sub-region.

Adopted Core Strategy Policy CE1 directs that the Town Centre shall be protected as the sub-regional shopping centre within the Town's retail hierarchy and the Council believes that as a consequence planned investment in the Town Centre will be seriously prejudiced and future investor confidence in the Town Centre harmed to the extent that growth in the Town Centre will stagnate for at least 10 years whilst Tollgate diverts footfall and trade away from the Town Centre. As a result, key regeneration sites within the Town Centre may not come forward as planned and that in the intervening period Colchester's Town Centre will fall behind its regional competitors as they continue to invest in their town centres. Having considered the proposal in the context of the National Planning Policy Framework (especially paragraphs 23-27) and associated National Planning Practice Guidance the Council considers that the harm to retailing in the Town Centre arising from the proposal is not outweighed by the benefits that are likely to arise from the proposal in the form of additional new jobs, widened consumer choice at Tollgate and associated public realm improvements.

3. Prematurity

In the opinion of the Council, the Tollgate Village proposal is premature within the context of the Council's ongoing Local Plan process and the programmed publication of Preferred Options and Site Allocations in summer 2016 with the anticipated submission of the final Draft Local Plan in 2017. Key elements of the emerging Local Plan are a review of the future strategic employment land and retail requirements of the Borough. This will involve both a quantitative assessment and a qualitative assessment together with a spatial analysis of the optimal distribution and location of significant growth in Town Centre and employment uses. This analysis will take account of wider sustainability issues and the Council opines that determination of the Tollgate Village proposal ahead of the next stage of the Local Plan (which will include comprehensive public consultation) will prejudice the ability of the Council to make strategic decisions based on a thorough evidence and analysis of all possible options rather than one that has an advantage of timing through the submission of a speculative planning application. A grant of consent for a proposal of this magnitude would effectively dictate issues of hierarchy prior to any consideration of such issues in the development plan.

4. Sustainable Development

The expansion of town centre uses of the magnitude proposed in this location with heavy reliance on trip generation by the private car with the resultant adverse impact identified upon the Town Centre together with the potential loss of planned employment growth within this strategic employment site and the resultant harm to the planned economic growth significantly outweighs the benefits identified to be delivered by the proposals. Consequently, in the opinion of the Council the development is inherently unsustainable contrary to paragraphs 6-14 of the Framework and the Government's explicit intention that the purpose of the planning system is to contribute to the achievement of sustainable development. The proposal is thus contrary to the strategic aims of the adopted local plan. The car-dominated

nature of the proposal is further evidenced by the associated highway improvements required by the Highway Authority that would result in the creation of a poor pedestrian environment contrary to adopted policy CE2b and Design Principles set out in the Stanway Vision Statement (2013) that require new development to deliver improvements to the public realm and create a pedestrian-friendly environment. The proposals are therefore also contrary to paragraph 64 of the NPPF and the Government's intention to contribute positively to making places better for people.