

27th January 2021

Report of	Strategic Director, Policy and Place	Author	Stephen Brown ☎ 01206 508822
Title	Matters Related to Third Parties Rights at Queen Street and the Alumno Development		
Wards affected	Castle		

1. Executive Summary

- 1.1 This report follows the Cabinet Report of 3rd June 2020 and seeks Cabinet's authorisation to appropriate for planning purposes, the land known as the former Bus Station and St James's House, Queen Street shown edged in red on the plan attached at Appendix A ("the Land") pursuant to section 122(1) of the Local Government Act 1972 in order to facilitate redevelopment in accordance with the planning permission granted in December 2019 or any redevelopment achieving similar regeneration of the Land (potentially involving other uses).
- 1.2 The Council is the freehold owner of the Land, which was formerly used as a bus station, ticket office, the now demolished St James' House, redundant garages and a former bus depot. The Land has been vacant and underutilised for many years and is now held as surplus land within the General Fund. The Land and the surrounding area are identified in the Core Strategy of the Council's Local Plan as forming part of a Town Centre and North Station Regeneration Area which the Council's planning policies seek to regenerate.
- 1.3 On 21 November 2018 Cabinet gave approval to the long leasehold disposal of the major part of the Land to Alumno Student (Essex) Ltd ("Alumno"). The Agreement for Lease was entered into on 27th February 2019.
- 1.4 On 13th December 2019 planning consent was granted for Alumno's development on appeal subject to certain conditions, one of which was disabled access arrangements from Priory Street where a solution is currently being discussed. The extent of the Land which is subject to the planning permission is shown edged in blue on the plan at Appendix A and is referred to in this report as "the Site".
- 1.5 Investigations carried out in preparation for the leasehold disposal of part of the Land to Alumno revealed that it is subject to a number of third-party rights which may benefit neighbouring land and which could potentially delay, restrict or prevent development. In addition, it appears that a small part of the Land (some 740 square metres) as shown on the plan at Appendix A is used by the public for occasional informal recreation ("Open Space"). The majority of the Open Space will be retained by the Council but maintained by Alumno, in association with their development, following practical completion of the works. A small area of the Open Space will be part of the development. Sections 5-9 of this report provide further details of these matters.
- 1.6 One effect of appropriating the Land for planning purposes would be that the provisions of sections 203 and 204 of the Housing and Planning Act 2016 (the "2016 Act") would

apply to the Site when development is carried out. Those provisions are described in the body of this report. In brief they enable development to be carried out even if it involves infringement of private third party rights such as easements (for example, private rights of way or rights to light) or restrictive covenants (such as restrictions on use), subject to the payment of statutory compensation to any third party who benefits from such a legal right and who suffers a relevant loss.

- 1.7 In deciding whether to appropriate the Land for planning purposes, Members will wish to be satisfied that the public interest in the redevelopment of the Site proceeding is sufficient to justify the interference with the rights of affected third parties and that reliance on statutory provisions to override those rights, subject to the payment of statutory compensation, is necessary and would be proportionate.
- 1.8 In addition, Members must consider any objections which have been received in response to the public notice which has been given in respect of the Open Space before deciding whether or not to appropriate this part of the Land.

2. Recommendations and Decisions Required

- 2.1 In relation to the Open Space, to consider all objections received by the Council within the period stated in the notice given in accordance with section 122(2A) of the Local Government Act 1972, before deciding whether or not this part of the Land should be included in the land to be appropriated for planning purposes pursuant to paragraph 2.4.
- 2.2 To note that if the Land is appropriated for planning purposes, section 203 of the Housing and Planning Act 2016 would enable the development to be carried out on the part of the Land which comprises the Site, notwithstanding any infringement of third party rights and interests covered by section 203 which burden the Site. The effect of this decision would be to override those third party rights, subject to payment of statutory compensation to affected parties under section 204 of that Act. It is acknowledged that discussions continue between the Council and Essex County Council, which is hoped will obviate the necessity to use section 203 in relation to their rights over the Site.
- 2.3 To give delegated authority to the Strategic Director, Policy and Place in consultation with the Portfolio Holder for Business and Resources to conclude legal documentation with individual rights holders (where known) in respect of the release or modification of their rights and to agree any compensation payable to these right holders.
- 2.4 Subject to paragraph 2.1 and consideration of the information in the reports in Parts A and B of this agenda, to appropriate the Land for planning purposes (as defined by section 246(1) of the Town and Country Planning Act 1990), pursuant to section 122(1) of the Local Government Act 1972.
- 2.5 To give delegated authority to the Strategic Director, Policy and Place in consultation with the Portfolio Holder for Business and Resources to vary the Agreement for Lease with Alumno and extend the long stop date of 1st March 2021 by a period sufficient to allow the completion of the leases to Alumno.

3. Reasons for Decision(s)

- 3.1 Appropriation will facilitate the redevelopment of the Site which would bring a number of benefits to the locality and contribute to the achievement of those adopted Local Plan planning policies that are relevant and the adopted St Botolph's Master Plan which together promote the regeneration of the area to bring economic, social and environmental well-being benefits.

- 3.2 The proposed Alumno development would be a major multi-million pound scheme at a time when inward investment would significantly boost confidence in the economic future of the Town Centre and aid the post Covid-19 recovery of Colchester in line with the Council's Coronavirus Recovery Plan. The additional student population and hotel users will benefit Queen Street and the Town Centre as a whole helping the sustainability of Colchester Town Centre as well as firstsite and Curzon. Benefits will also include a substantial amount of additional jobs both during and after construction and a significant improvement to the general environment and public realm. Additional detail is in the later sections 4.7, 12 and 18 of this report. Covid 19 has had a significant detrimental effect on Colchester town centre and at a time when property developers are re-examining their commitment to schemes, Alumno have made it clear that they are still committed to Colchester and want to commence with their investment as soon as possible.
- 3.3 As described in section 5 of this report, the Land is understood to be subject to a number of third-party rights and restrictions which could potentially inhibit its development. The full extent of the rights burdening the Land and the degree to which they are legally enforceable are not known or easily ascertainable. Whilst efforts to negotiate with certain identified parties are underway (and will continue if the recommendations in this report are approved) it is considered highly unlikely that securing releases of all such rights by private agreement with individuals can be completed in a reasonable timescale if at all, and would still leave significant uncertainty. It is therefore considered that appropriation of the Land is necessary to enable the development to proceed within a reasonable timescale.
- 3.4 Given the constraints, it is unlikely that any scheme could be designed to avoid inference with the rights. Without appropriation there would be a risk of an injunction or damages and no developer is likely to progress a development as it is considered unlikely that releases will be successfully negotiated with all of the affected parties within reasonable timescales.
- 3.5 For the majority of the rights holders, there will only be disruption during the construction period (approximately 18 – 24 months) and the various rights of way to the rear of their premises, access to the car park and servicing area shown in Appendix B will be reinstated once construction has been completed. Furthermore, any person who suffers a relevant loss as a result of their rights being infringed, either on a temporary or a permanent basis, would be entitled to receive compensation under section 204 of the 2016 Act.
- 3.6 The appropriation of all of the Land (including that outside the blue line of "the Site" shown on the plan at Appendix A) will ensure that the entirety of the Council's freehold interest in the Land is held for planning purposes for potential future regeneration where appropriate. In the case of the Open Space, if the currently permitted development proceeds, the major part of this land would continue to be available for use by the public as open space and it will be maintained in association with the development of the Site.
- 3.7 The current long stop date within the Agreement for Lease to Alumno is 1st March 2021. This needs to be extended as a consequence of the planning consent taking longer than expected to obtain after going to appeal, the time taken in seeking to negotiate with rights holders and other interested parties and the corresponding impact on compliance with outstanding conditions in the Agreement for Lease. The amount of the extension required before the leases can be completed will depend on how quickly these remaining obligations can be addressed.

4. Background Information

- 4.1 The Land comprises an important town centre redevelopment site, forming part of the St Botolph's Quarter adjoining firstsite, the Creative Business Centre and the new Curzon Cinema, with a substantial frontage to Queen Street. It sits within the Town Centre and North Station Regeneration Area.
- 4.2 On 21 November 2018 Cabinet gave approval to the grant of a long leasehold interest in a major part of the Land to Alumno Student (Essex) Ltd for the proposed development on the Site. The Agreement for Lease was entered into on 27th February 2019.
- 4.3 On 13th December 2019 Alumno received planning consent after winning its planning appeal. There was no subsequent statutory challenge.
- 4.4 The completed scheme will form the next phase in the regeneration of the St Botolph's area and, in particular, bring most of this derelict site back into economic use with a new development including a new hotel, a mix of retail, restaurant, community and studio uses, along with purpose built student accommodation.
- 4.5 The development will also provide new public realm, particularly along the Roman Wall to the south of the development and in a new open square area to the rear of the former bus depot. A plan of the scheme can be seen in Appendix F.
- 4.6 The proposed development will provide links between the new Curzon Cinema development at Roman House, the Creative Business Centre at 37 Queen Street and the firstsite gallery.
- 4.7 The development would fulfil the Council's planning policy commitment of regenerating the area and would bring economic, social and environmental well-being benefits to the Council's area including:
 - Alumno has advised that the development is costing in excess of £39m. It is therefore a significant substantial inward investment into Colchester town centre at a time when Covid 19 has had a dramatic negative effect on the town centre and its businesses.
 - Once operational, it is understood that the Alumno scheme will generate c. 60 FTE jobs (hotel and student accommodation, studios and retail), providing a significant boost to Colchester's economy.
 - Once constructed, the scheme itself will generate benefits for local businesses as it will bring in visitors and generate significant student spend into the local economy. Alumno have estimated that there will be an additional £2.7m spent annually in the local economy from 336 new students and those staying in the Travelodge hotel.
 - Throughout construction, Alumno has advised that employment is likely to exceed 300FTE during fitting out of both the student accommodation and the hotel.
 - This area has been largely derelict for several years, and Alumno's redevelopment will significantly improve the whole area making the public realm far more attractive and accessible and improve public safety. It will also help provide an enhanced connection to firstsite from the town centre via Queen Street and the Priory Street car park.

5. The Land and the need for appropriation

- 5.1 The majority of the Land was acquired by the Council in 1956 from Essex County Council for use as a bus station and car park. The Land is currently held in the General Fund as surplus land.
- 5.2 The Land extends to approximately 2.6 acres (1.05 hectares) and the main proportion, which was formerly the bus station, now consists of rough ground. The route behind St James's House and Curzon is used by occupiers of some neighbouring properties to gain access to parking spaces and for deliveries.
- 5.3 Investigations into the title to the Land have revealed that the Land is subject to:-
- a number of express rights of way. There may also be some prescriptive rights of way. These are rights which although they have not been expressly granted in writing, may have been gained through regular use over a period of at least 20 years. It is not possible to ascertain all of the potential beneficiaries;
 - restrictive covenants which if enforceable, might also be infringed by the development. Whilst the nature, extent and beneficiaries of these covenants are known for a number of these covenants, there are other potential covenants in respect of which the Council has limited or no information and so the beneficiaries and extent to which they remain enforceable cannot be fully ascertained;
 - there may be further rights that could be interfered with by the scheme but the extent (if any) of such rights and the interference with them is currently not known
- 5.4 The full extent therefore of the rights burdening the Land is not known or easily ascertainable. Identifying all such rights, assessing the extent to which they are enforceable and would be infringed by the development and then endeavouring to secure a release of each right by negotiation, would take a considerable amount of time and cost and may be impossible to achieve.
- 5.5 Given the risk of prescriptive rights having arisen, even following the completion of an exercise to identify affected rights and covenants, there would be no certainty that all such matters had been addressed and all risks of injunction removed. The appropriation of the part of the Land comprising the Site is considered to be necessary to enable the development to proceed within a reasonable timescale. The appropriation of the remainder of the Land (outside the blue line shown on the plan at Appendix A) will ensure that the entirety of the Council's freehold interest in the Land is held for planning purposes for potential future regeneration where appropriate. In the case of the Open Space, if the currently permitted development proceeds, this land would continue to be available for use by the public as open space and it will be maintained in association with the development of the Site.
- 5.6 If the development proceeded without addressing these rights then there would be a risk of injunction from third party rights holders. If such a claim was made, it could delay or prevent development. Given the extent of the rights and beneficiaries, development by this developer or any other proposals for major redevelopment of the Land is likely to be prevented or significantly constrained.
- 5.7 By appropriating the Land for planning purposes, the Council would enable development of the Site to be carried out in accordance with the Alumno planning permission (or any other redevelopment scheme achieving regeneration of the Land for which planning permission is granted) even if it involves an infringement of third party rights and interests

which are subject to section 203 of the 2016 Act. Any person who suffers a relevant loss as a result of their rights being infringed would be entitled to receive compensation under section 204 of the 2016 Act. Furthermore, it is envisaged that the majority of the known rights holders will only suffer temporary disruption during construction and once the development is completed will again be able to access the car park and servicing area shown in Appendix B via a similar route.

- 5.8 The Land is tightly constrained. Consequently, there is very limited scope to design a scheme which would sufficiently achieve the regenerative potential of the Land in accordance with the planning policies and which would avoid infringing all third-party rights.
- 5.9 This site was identified as a major site within the 2005 St Botolph's Quarter Masterplan. Since that date the Council has been working to find a suitable development which will be viable considering the difficult constraints and issues of the site. If this scheme does not go ahead it is likely to be many years before another suitable scheme could be recommended.

6. Rights of Way beneficiaries

- 6.1 The majority of the rights which are affected by the development relate to the right of vehicular access to the car park shown outlined in blue on the plan in Appendix B and/or access for servicing to those properties surrounding that car park. There are other rights of access enjoyed by, for example, firstsite, Curzon the Creative Business Centre and Essex County Council.
- 6.2 In relation to the car parking - the beneficiaries of the rights of access with associated car parking spaces will only experience a temporary restriction as a result of the need to close off the access route to the car park during construction due to health and safety reasons. To mitigate this interference those people benefitting from a legal right have been offered free alternative parking at Priory Street car park whilst the construction works are on-going. Once the works have been completed, which is estimated to be approximately 18-24 months, access to the car parking area will be reinstated via the existing service road (or a similar route) and so use of the existing car parking spaces can resume at this point.
- 6.3 The right of way users, in particular the residential occupiers, have highlighted a number of issues, mainly safety related, in having to park their vehicles in Priory Street car park and walking along Priory Street and Queen Street, particularly late at night. Therefore, negotiations have commenced with firstsite over a revised temporary right of way leading from Lewis Gardens to the car park shown in Appendix B via the front of firstsite. Firstsite were sympathetic and have provisionally offered to allow affected residents temporary access via Lewis Gardens during certain times of the day subject to some form of compensation due to the disruption. The details of this potential arrangement are still subject to negotiations with both firstsite and the residents as the residents will have issues if they only having limited access.
- 6.4 The majority of those benefiting from the rights of access use them for servicing adjoining properties. The ability to use the existing means of servicing will be prevented during the course of construction. To mitigate this interference a loading bay on Queen Street (or other appropriate nearby areas) will be made available during the development works. Again, once the works are complete the original servicing arrangements will be reinstated.
- 6.5 Following the Cabinet decision on 3rd June 2020, the jointly appointed rights of way surveyor has had ongoing negotiations with the owners of those properties affected by the redevelopment. During July 2020 the rights of way surveyor wrote to everyone that is

believed to benefit from a legal right of way and anyone with a suspected prescriptive right of way (of the nature detailed at paragraph 6.1) which it is anticipated will be adversely affected by the development. Firstsite, Curzon and the Creative Business Centre, Essex County Council were contacted separately as mentioned below and in paragraph 7. The list of potential rights of way holders is in Part B of the Report in Appendix D. The typical letter that was sent out with the attachments is in Appendix C. Appendix D also has an update on the current stage of negotiations with the individual rights holders and is contained within Part B of the Report.

- 6.6 To summarise progress to date, from the initial letters sent in July, c.25% responded within 6 weeks accepting the offer of a telephone meeting. After a follow-up letter in July, a further two telephone meetings were set up. Following some common concerns, a Frequently Asked Questions list was issued to all affected parties, but response was relatively limited, with only two further parties engaging. To try and get further engagement and to commence negotiations further follow-up letters were sent in November with reminders to those who didn't respond in early January 21. In summary, our rights of way surveyor has had direct contact with c. 50% of those parties, and are progressing with voluntary arrangements with c.15%. Feedback from commercial business occupiers has been limited, but where parties have engaged good progress has been made in agreeing the alternative parking arrangements during the works. In the opinion of the Council and of the right of way surveyors, despite negotiations with many commercial and residential occupiers progressing, considering the number of parties that have been willing to engage with the right of way surveyors and the Council over the past six months, it is unlikely that agreement will be reached with all interests within a reasonable timescale, if at all. It should be noted that if the recommendations in the report are approved those negotiations will continue and that all those with a legally enforceable right of way will receive statutory compensation to compensate them for this inconvenience.
- 6.7 It is considered that some of the residential right holders would agree revised access arrangements if full temporary access via Lewis Gardens over the land fronting firstsite could be secured. However as referred to above, at this stage firstsite have provisionally offered limited access which does not meet all of their concerns. Negotiations with firstsite are on-going. Firstsite leases the land from the Council and it is the Council's preference to agree this option with firstsite on a mutually beneficial basis. If full access is agreed, this would allay many of the safety fears of the residents.
- 6.8 In the event that the Council resolves to appropriate the Land for planning purposes, the Council will continue to negotiate with the beneficiaries of the rights of way referred to in paragraph 6.1 as well as trying to mitigate the impact on the beneficiaries, insofar as they can be identified. This will include, where appropriate, the alternative parking and loading bay provision during the course of the works mentioned above but also the revised means of access (which will be similar to the existing route) on completion of the development. Negotiation will also continue with firstsite over the use of Lewis Gardens as referred to above. In addition, financial settlements will need to be made with the affected parties where appropriate. The costs implications of this are included within the Financial Section at Paragraph 15.
- 6.9 Curzon, firstsite and the Creative Business Centre are the Council's tenants. The rights of way surveyor wrote to each of these entities in August 2020 to discuss variations to their respective leases to permit the development. Curzon were also contacted back in March 2020 on behalf of the Council to discuss the required variations.
- 6.10 Curzon has recently been sold to an American media group. The details of the proposed variations are currently with them and are being considered. However, Curzon will benefit

from the development of this land and the increased customer base so it is likely they will respond positively.

- 6.11 As well as having a part to play in the access to Lewis Gardens to assist the local residents, firstsite also have rights of way within their lease over the Land. These will be dealt with as part of the wider discussion over the use of Lewis Gardens.
- 6.12 The Creative Business Centre are obliged within their lease to accommodate these proposals and as part of their lease terms will be offered parking within Priory Street car park on preferential terms.

7. Other beneficiaries including Essex County Council

- 7.1 Essex County Council benefits from various rights and covenants that affect the Land which include restricting the use of the relevant part of the Land to that of a bus depot or use for a statutory function, which would be breached by the development of the Site and a right of way which permits Essex County Council to pass over part of the Land by way of a fixed route, which again would be affected by the development. Further details of Essex County Council's rights and the following matters are included in the Part B Report.
- 7.2 Negotiations between the Council and Essex County Council have been undertaken over a number of years in respect of proposals to redevelop the Land and although they have resulted in a degree of relaxation to enable the firstsite development to be undertaken they have not led to the removal of all the restrictions.
- 7.3 In January 2019 the Director of Legal and Assurance at Essex County Council wrote to the Council offering to release all the restrictions in return for a capital sum and on the basis that no confirmation was provided by Essex County Council that it was the sole beneficiary of the rights and covenants. Both the Council and its professional advisers have sought to progress agreement of the release following receipt of the January 2019 correspondence but no substantive response has been received from Essex County Council and it is unlikely that an agreement will be reached within reasonable timescales.
- 7.4 By the Council appropriating the Land and our consequent ability to utilise s203, Essex County Council would not as a consequence be able to use this covenant or the existence of the right of way to block the development of the Site, although statutory compensation would be payable to Essex County Council. The likely budget figure has been included in the Part B Report.
- 7.5 As noted above there are other parties who benefit from rights subject to section 203 which may be affected by the development. Appropriating the Land will ensure any such right holders cannot impede the development of the Site, but they will be entitled to statutory compensation if the value of their property is diminished.

8. Effects of appropriation and section 203 Housing and Planning Act 2016

- 8.1 Section 122 of the Local Government Act 1972 enables the Council to appropriate land held for one purpose to another purpose, provided that (a) the land is no longer required for the purpose for which it is held immediately before the appropriation and (b) the Council would (in principle) have power to acquire land by agreement for the "new" purpose. One effect of appropriating the land in this case would be to trigger the application of section 203 of the Housing and Planning Act 2016.

- 8.2 Where section 203 of the 2016 Act applies, it authorises both building works and the subsequent use of land even if that would involve infringement of private third-party rights such as easements or restrictive covenants. Any third party who benefits from such a right and suffers loss in terms of a reduction in the value of their land would be entitled to claim statutory compensation under section 204 of the 2016 Act from the person who carries out the development, but they would not be able to sustain a private law claim for an injunction or damages. Their rights would not "disappear" but they would be rendered unenforceable against the development. Provided the conditions of section 203 of the 2016 Act are met, it is irrelevant who carries out the development or who owns the land at that time.
- 8.3 Section 203 and its predecessor provisions have been relied on by a number of other councils to assist in the regeneration of city centre sites and other important regeneration schemes. By way of example, these councils include Enfield, Croydon, Lambeth, Wandsworth, Westminster, Kensington and Chelsea, Haringey, Kingston-upon-Thames, Bath & North East Somerset, Birmingham, Guildford, Brent and Wolverhampton.
- 8.4 The requirements for the application of these statutory provisions are further explained in the Legal Implications section of this report.

9. Open Space Implications

- 9.1 As noted above, it appears that a small part of the Land (approximately 740 square metres) to the rear of 15 Queen Street, which comprises an open area of land with some seating, is being used by the public for occasional informal recreation. This land might be considered to be "de facto" open space for the purpose of section 122(2A) of the Local Government Act 1972. This area of land links firstsite and Queen Street and is paved with steps and a seating area. A small part of the Open Space, approx. 43 sqm, shown in the plan in Appendix F will be part of the new commercial space, with the student accommodation above. There will also be a canopy over part as shown in the plan. During the construction period the majority of the Open Space will be fully accessible – albeit it will not be possible to pass over the Open Space and through the remainder of the Site. Once the development is completed most of this area will continue to be available as open space and the new steps will be incorporated as per the plan in Appendix F. The paving material will match the rest of the public realm.
- 9.2 Ownership of the majority of the Open Space is to be retained by the Council and is to be maintained by Alumno in association with their development. Following completion of the development, members of the public will continue to be allowed to access the majority of this land as open space. Moreover, as noted in paragraph 4.5, the development is to provide new areas of public realm.
- 9.3 Section 122(2A) of the Local Government Act 1972 provides that a local authority may not appropriate any land consisting of open space unless, before doing so, the authority advertises notice of its intention to appropriate the land in two consecutive weeks in a newspaper circulating in the area in which the land is situated. In addition, before reaching a decision on whether to appropriate the land, the local authority must consider any objections to the proposed appropriation.
- 9.4 Notice of intention to appropriate the Open Space for planning purposes was advertised in the Essex County Standard on 14th August and 21st August 2020 and the notice and relevant plan were published on the Council's website. Responses were requested by 28th August 2020.

- 9.5 19 letters and emails were received in response to the public notice in respect of the Open Space and certain representations have also been made directly to Members. These are reproduced in Appendix E to which Members are referred. A summary and officers' comments on the objections also appear in Appendix E. Names and addresses and other identifying information have been redacted where appropriate in this report.
- 9.6 In summary, although a number of the responses do relate to the Open Space, many of them raise wider issues about the proposed development. The comments can generally be split into the following categories: -
- Concern over the potential loss of Open Space and/or retaining access to firstsite and The Minories.
 - Those who are directly affected by the scheme in terms of individual rights. Their objections primarily relate to access and are questioning why Lewis Gardens cannot be used to access their Car Park area rather than having to use Priory Street car park during construction. As mentioned above, the Council is speaking to firstsite over this option and we are hopeful that at least partial access via Lewis Gardens can be agreed. Negotiations continue.
 - Those who are strongly against the scheme in general and either do not believe that the Council should use its powers of appropriation or that it is not legal for the Council to do so.
- 9.7 The above is intended only as a general overview of the responses. It is important that Members give consideration to the objections themselves which are reproduced in Appendix E.

10. Alternative Options

- 10.1 The Council does not agree to appropriate the Land and engage section 203 to override third party rights. In which case, the alternative would be to seek to identify and release all of the third-party rights by negotiation. Following legal and specialist third party rights surveyor's advice, officers do not consider that this can be achieved within a reasonable timescale to enable the redevelopment to proceed and it might still leave uncertainty as to whether all the relevant rights had been addressed. This would potentially inhibit redevelopment of the Land and at worst it could result in no redevelopment proceeding due to additional costs and delay with the likely resultant loss of the significant investment in the Town Centre worth millions of ongoing spend at this critical time for the future of the Town.

11. Legal Implications

Power to appropriate land – section 122 Local Government Act 1972

- 11.1 Powers to appropriate land enable a local authority to change the statutory purpose for which they hold their land. The power to appropriate land under s122 of the Local Government Act 1972 applies to land held for most statutory purposes and is available in respect of the Land. It is noted that the Land is held as surplus land in the General Fund and there is nothing to suggest that any of the alternative appropriation powers (e.g. in respect for land held for housing or planning purposes) would be relevant here.

11.2 As noted above, the Council has power under section 122 of the Local Government Act 1972 to appropriate the Land for planning purposes provided that:

- a. the Land is no longer required for the purpose for which it is held immediately before the appropriation; and
- b. the Council would (in principle) have power to acquire land by agreement for the "new" purpose

In respect of the first requirement, a local authority must give specific consideration to the question of whether the land continues to be required for its existing purpose and in doing so, it must consider the comparative needs in the public interest for the existing use and the proposed new use. It is not necessary that the land should be surplus or unused. In *R (on the application of Maries) v Merton LBC* [2014] EWHC 2689 (Admin) the Judge summarised the principles from the earlier case law as follows:

- 1) whether land is still or is no longer required for a particular purpose, meaning no longer *needed* in the public interest of the locality *for that purpose*, is a question for the local authority, subject to *Wednesbury* principles, and not the court.
- 2) the statute is concerned with relative needs or uses for which public land has been or may be put. It does not require it to fall into disuse before the authority may appropriate it for some other purpose.
- 3) the authority is entitled when exercising its appropriation power to seek to strike the balance between comparative local (public interest) needs: between the need for one use of the land and another with the wider community interests at heart. It is for it to keep under review the needs of the locality and is entitled to take a broad view of local needs.

This report describes the current uses of the Land and the public benefits in the redevelopment proceeding to enable Members to make this comparison and strike the appropriate balance.

With regard to the second requirement of section 122, the Council has power to acquire land by agreement for planning purposes under s227 of the Town and Country Planning Act 1990. Section 227 enables land to be acquired by agreement:

- (a) if the authority think that the acquisition will facilitate the carrying out of development, re-development or improvement on or in relation to the land, or
- (b) which is required for a purpose which it is necessary to achieve in the interests of the proper planning of an area in which the land is situated.

Where land is proposed to be acquired to facilitate development, redevelopment or improvement under (a) above, the authority must also think that that the development etc. is likely to contribute to the promotion or improvement of the economic, social and/or environmental well-being of its area. The well-being benefits of the redevelopment proceeding are summarised in paragraph 4.7 and sections 12 and 18 of this report.

11.3 In addition to the specific requirements of section 122, case law indicates that where third parties are known to have rights which may be affected by the appropriation, a local authority should not use its powers unless it has good reason to believe that the interference with their rights is necessary. Any interference with the human rights of affected parties must be justified by the public interest in the scheme proceeding and it

must be proportionate. The Human Rights implications of the proposals are referred to further in section 16 below.

Power to override easements and other rights – sections 203 and 204 Housing and Planning Act 2016

- 11.4 As noted above, where the conditions for the application of section 203 of the Housing and Planning Act 2016 are met, it enables building works and subsequent use of land even if they involve interference with private third party rights and interests, but subject to the payment of statutory compensation to any third parties who benefit from such a legal right and suffer loss in terms of a reduction in the value of their land. In effect, the development is rendered immune from private law proceedings, for example a claim for damages or an injunction, but an injured third party whose rights are overridden is instead entitled to receive statutory compensation. The third party rights are not extinguished, but they are rendered unenforceable against the development, so that neither an injunction nor damages can be obtained.
- 11.5 The type of rights and interests which can be overridden where s203 applies include easements such as rights of way and rights to light, rights to support and other rights and privileges which benefit other land, as well as contractual restrictions on the use of land.
- 11.6 Provided the criteria in section 203 are met, it is irrelevant who carries out the development. The overriding provisions in section 203 could therefore apply to development undertaken by a transferee or lessee of land from the Council, such as Alumno.
- 11.7 One of the situations in which section 203 can apply is where a local authority appropriates land it already owns "for planning purposes". There are four basic requirements in section 203, all of which must be satisfied if the overriding provisions are to apply. In the present case those conditions are:
 - a. There must be planning permission for the development (i.e. the building or maintenance works and/or the use) that causes the interference with or breach of third party rights.
 - b. The development must be undertaken on land that has been appropriated by the local authority "for planning purposes" (as defined by s246(1) of the Town and Country Planning Act 1990).
 - c. The local authority could (at least in principle) acquire the land compulsorily for the purposes of the development.
 - d. The development must be related to the purposes for which the local authority acquired or appropriated the land.
- 11.8 If Members resolve to appropriate the Land for planning purposes and development proceeds in accordance with the current planning permission, the conditions for application of s203 would be met in relation to the Site (i.e. the part of the Land edged in blue on the plan in Appendix A):
 - a. There is planning permission for the development of the Site, granted to Alumno on 13 December 2019.
 - b. The development would be undertaken on land which has been appropriated for planning purposes. "Planning purposes" are defined to include land which has been

appropriated for purposes for which land could be purchased by agreement under section 227 of the Town and Country Planning Act 1990 (see paragraph 11.4 above).

- c. In principle, the Council would have power to acquire land compulsorily for the purposes of the development under section 226 of the Town and Country Planning Act 1990. Section 226 applies in the same circumstances as those summarised in paragraph 11.2 in respect of section 227 (but subject to authorisation by the Secretary of State).
- d. The purpose of the development is related to the purposes for which the land is proposed to be appropriated by the Council (namely to facilitate redevelopment in accordance with the current planning permission or other regeneration scheme).

11.9 Section 204 of the 2016 Act provides for the person who undertakes the development to be liable for any compensation which is due to third parties whose rights are infringed. The local authority will ensure that the compensation is paid to those affected. The compensation is calculated in the same way as compensation for "injurious affection" under sections 7 and 10 of the Compulsory Purchase Act 1965. This normally involves a "before and after" assessment of what the third party's land was worth with before and after any interference with their rights.

11.10 Although the whole of the Land is proposed for appropriation for planning purposes, it should be noted that the power to override third party rights under section 203 would only apply to development of the Site and not to those parts of the Land which sit outside the blue line on the plan at Appendix A. The reasons for appropriation of the whole of the Council's freehold interest in the Land are explained in paragraph 3.4.

Special requirements in relation to proposed appropriation of open space land

11.11 As noted in Section 9 of this report, as required by section 122(2A) of the Local Government Act 1972, Members must consider any objections which have been received in response to the notices given in the local newspaper, before reaching a decision on the proposed appropriation of the part of the Land referred to above as the Open Space.

12. Strategic Plan References

- 12.1 The proposed development will enhance the diverse mix of uses in the immediate location and complete the final major site identified in the 2005 St Botolph's Quarter Masterplan.
- 12.2 The development will meet the 'Growth' and 'Opportunity' strategic aims and will help create an attractive and sustainable location where people can be proud to work.
- 12.3 The recommended development will "Promote Colchester to attract further inward investment and additional businesses, providing greater and more diverse employment."

13. Consultation

- 13.1 The Land has been subject to considerable public consultation over the last 10 years however more recently Alumno ran a pre-planning consultation exercise and continue to engage with local councillors, groups and individuals.
- 13.2 The scheme has had a difficult planning journey and has been discussed at length at the planning committee on 28th February 2019 and again at the appeal hearing which took place over a number of days during October 2019.

- 13.3 The statutory requirements in relation to advertising the intention to appropriate open space land have been complied with in relation to the Open Space and the representations and objections which have been received in response are reported in Appendix E. Names and addresses and other identifying information have been redacted where appropriate in this report.

14. Publicity Considerations

- 14.1 There has been significant publicity around the proposed development. This is being addressed by the developer and their communications advisors, as well as the Council where appropriate.

15. Financial implications

- 15.1- The financial implications have been included within Part B of the Report.
15.3

16. Human Rights

- 16.1 Section 6 of the Human Rights Act 1998 prohibits public authorities from acting in a way which is incompatible with the European Convention on Human Rights.
- 16.2 A decision by the Council to appropriate land for planning purposes which has the effect of engaging section 203 of the 2016 Act to override third party rights may involve interference with the human rights of neighbouring owners, in particular:
- the right to peaceful enjoyment of possessions under Article 1 of the First Protocol of the European Convention on Human Rights; and
 - in the case of residential property, the right to respect for private and family life and home under Article 8 of the European Convention on Human Rights.
- 16.3 Whilst these are very important rights, they are not unqualified. Article 1 of the First Protocol indicates that in any decision which engages this right, a fair balance must be struck between the public interest and the private rights protected by Article 1. Article 8 acknowledges that interference with the right to respect for private and family life and a person's home may be justified if it is in accordance with law and necessary in a democratic society. Any such interference must be proportionate in the public interest. In relation to Article 1, the existence of a right to compensation may be relevant to some degree when determining whether the interference with private rights is proportionate.
- 16.4 Members should consider the potential effects on third parties whose rights would be infringed as well as the public benefits of the proposed redevelopment proceeding. Paragraphs 5 - 7 of this report refer to the third party rights. The public benefits of redevelopment proceeding are summarised in paragraphs 3.1 and 4.4- 4.7 and 12 of this report.
- #### **17. Equality, Diversity, Community Safety and Health and Safety implications**
- 17.1 Section 149 of the Equality Act 2010 places a local authority under a legal duty ("the public sector equality duty") to have due regard to the following matters in the exercise of all its functions, namely the need to:
- a. eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act;

- b. advance equality of opportunity between persons who share a "relevant protected characteristic" (i.e. age, disability, sex, gender reassignment, pregnancy and maternity, race, religion or belief and sexual orientation) and persons who do not share it; and
- c. foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

17.2 The public sector equality duty is a continuing duty which Members must consider and review at all stages of decision-making. An EqlA report in respect of the redevelopment of the land has been prepared to which Members are referred:

<https://cbccrmdata.blob.core.windows.net/noteattachment/CBC%20-%20How%20The%20Council%20Works%20-%20Commercial%20Equality%20Impact%20Assessments%20-%20Asset%20Management%20Strategy%202016%20to%202021.pdf>

17.3 This proposed development was fully considered during the planning appeal hearing and the planning inspector would have taken due consideration of the full impact of the scheme before making the decision to accept the appeal and award planning consent for the development.

18. Environmental and Sustainability implications

18.1 It is proposed that the development will achieve a 'Very Good' BREEAM Rating in terms of water efficiency, energy and CO2 emissions, waste and recycling, sustainable construction, biodiversity and the regeneration of an underutilised site within an urban area. This is in accordance with the definition of sustainable development in The National Planning Policy Framework and the Council's commitment to being carbon neutral by 2030.

19. Risk Management Implications

19.1 The key risks identified are set out below:

Risk description	Impact and / or Consequences	Risk Mitigation / Controls
Loss of investment	The loss of this multi-million pound investment at this time in the Town Centre would have significant negative impact on the confidence in the Town and would impact its rate of recovery. It would also mean the lost opportunity of c. 60FTE permanent jobs and a c. £2.7m p.a. loss of spend within the town. It is also likely to deter future developers in investing in the town centre.	Appropriation and use of s203 as recommended in the report is the best potential mitigation.

Background Papers

None

Appendix A - The Land, the Site and the Open Space

Appendix B -	Car park and servicing area to be affected by Appropriation
Appendix C -	The typical letter sent to rights of way holders with attachments
Appendix D –	Update on right of way holders negotiations are in Part B of the Paper
Appendix E –	Comments received following the Open Space notice (names and addresses and other identifying information have been redacted where appropriate)
Appendix F –	Alumno scheme with Open Space overlaid