

Andrew Weavers
Strategic Governance Manager and Monitoring Officer
Colchester Borough Council

By email only

Your ref:
Our ref: PT
Date: 26 January 2021

Dear Andrew

Legal Concerns: Colchester Borough Council Cabinet Meeting Wednesday 27 January 2021: Agenda Item 8ii – ‘Queen St, Matters Related to Third Parties Rights at Queen Street and the Alumno Development’

I am writing to you in your capacity of Colchester Borough Council’s Monitoring Officer to exercise your powers under section 5 of the Local Government and Housing Act 1989 to stop the Cabinet making any decision on the above report.

I am making this request for the following reasons:

1. Consultation

The necessary consultation has not taken place and the consultation that there has been is defective.

In making a decision on appropriation you are doing so with the express intention of overriding the County Council’s legal rights. This should only be done if it is necessary and proportionate. You are well aware that a decision on appropriation will potentially have a severe and direct impact on ECC’s interest in land. Yet you did not consult the County Council or notify it of the consultation.

This is surprising given you notified ECC of the June 2020 Cabinet report, given that your representative was in in dialogue with the County Council over the summer when the consultation was taking place and that you notified us of the January 2021 report.

Given our interest and your involvement of ECC in this matter, ECC had a legitimate expectation that Colchester Borough Council would not make a decision without consulting us on the proposal. You have not met our legitimate expectation.

If a decision is taken on 27 January, you will do so in breach of our legitimate expectation to be consulted. The decision must be postponed to allow Essex County Council to be consulted.

As you know we have asked on numerous occasions for this report to be postponed. There has been insufficient time to put together a full objection but this letter is to be considered as Essex

County Council's objection to the proposed appropriation/disposal. The County Council wishes to be allowed a period to object in more detail and for that objection to be considered.

Turning now to the public consultation. According to the report, the public consultation gave people who saw the advert between 7 and 14 days to object. Although there is no statutory minimum period in section 122 of the Local Government Act 1972, the case law on consultation periods would suggest that that was an inadequate period of time to give people to respond to such a significant issue on such a key site. The necessity to allow adequate time is increased given that it was in the middle of a global pandemic when normal activities were severely disrupted.

This appears to be a clear breach of the Gunningⁱ principles.

2. Incorrect application of the legal tests

As the report states at paragraph 11.2, in order to appropriate land the Council must, by law, be satisfied either :

- (a) that the appropriation will facilitate the carrying out of development, re-development or improvement on or in relation to the land and the authority think that the development, re-development or improvement is likely to contribute to the achievement of any one or more of the following objects—
 - (a) the promotion or improvement of the economic well-being of their area;
 - (b) the promotion or improvement of the social well-being of their area;
 - (c) the promotion or improvement of the environmental well-being of their area.; or
 - (b) that the land 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.

It is not clear from the report which of these tests the report author considers to be met but and there is no proper analysis of either. Nor does the recommendation make it clear what the recommended option is. A resolution to appropriate based on the current recommendations would be unlawful.

3. Material considerations

There are a number of key omissions from the report:

- (a) The report is misleading concerning the master plan. For example it says 'Appropriation will ... contribute to the achievement of those adopted Local Plan planning policies that are relevant and the adopted St Botolph's Master Plan' without recording the fact that the development is principally for student accommodation and a hotel, neither of which are proposed for this site in the Master Plan.

The only reference to a hotel in the master plan is the possible use of East Hill House, there is no reference to any regeneration need for a new build hotel. Indeed East Hill House is now owned by the operator of an adjoining hotel. Its proprietor is opposed to the proposed development and appeared as a rule 6 party at the public inquiry in opposition to the Alumno development.

There is no reference in the masterplan to any need or intention to provide student accommodation. To say that the development will contribute to achieving the St Botolph's Master plan is on any view wholly misleading and inaccurate.

- (b) The report states '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'. I assume that this is a reference to my letter to you dated 25 January 2019. On no basis could that letter be construed to be an offer to release all the restrictions in return for a capital sum. No offer was made and it was sent in the course of ongoing correspondence. This is highly misleading in a report which is predicated on the basis that you need to override ECC's rights based on the lack of progress with negotiations.
- (c) The report presents a misleading picture of the discussions between ECC and CBC. We were approached by an external surveyor who was jointly instructed by the Borough and Alumno in July 2020. We repeatedly invited the surveyor to ask us to discuss the situation directly and nothing was heard from Colchester Borough until January 2021. It is untrue to say that you have made any serious attempt to progress things since June 2020.
- (d) The report only identifies the positive impacts of the development. It fails to acknowledge that this development is extremely unpopular, that your own planning committee refused permission which had to be overturned on appeal, the fact that it is opposed by many members of the community. The objections raised are not addressed in the report or its appendices. The Borough Council's reply to objections is frequently to say that planning permission has been granted.

In its assessment of whether it is appropriate to appropriate the land the report neglects to mention that the Borough Council's Planning Committee was opposed to the scheme having refused to grant it planning permission. Many objections raised at the planning stage were upheld by the members of the Borough Council's planning committee. If the Borough Council now considers that it should reject those concerns then it should explain why it is doing so. The report does not even acknowledge the widespread objections to the development, nor that the development is contrary to the master plan nor that there is an interest in developing alternative proposals.

- (e) The Cabinet must have regard to the purpose of conserving biodiversity as required by section 40 of the Natural Environment and Rural Communities Act 2006. This is a major development. Although paragraph 18 mentions the word 'biodiversity' it does so only in the context of achieving BREEAM 'very good' in construction but no real consideration is given to the impact (positive or negative) on biodiversity.
- (f) Correspondence from Cllr Mark Cory – In his correspondence with the County Council, Cllr Cory has referred to a number of considerations which are uppermost in his mind in terms of the contractual position and commercial relationship between the Borough Council and the developer, and which are no doubt uppermost in the consideration of the Borough Council, yet they are not mentioned in the report. These appear to us to be of very significant importance to the Borough Council but are not mentioned in the report. As you are aware it is important that a statutory power is only exercised for the purpose for which it was conferred.

4. Equalities

The report sets out requirements of section 149 of the Equality Act 2010. Then it says that an EQIA has been prepared with respect to the development. There is a hyperlink to the Equality impact Assessment EQIA. Although it is said that an EQIA has been done with respect to the redevelopment of the land, the link takes you to a link to the EQIA relating to the Colchester

Borough Council Asset Management Plan 2016-21. That document is of necessity a high level equality impact assessment and does not attempt to consider the equality impacts of the proposed development at all. It does not consider any equality impacts on members of the public at all other than financial benefits to the Borough Council and does not identify any negative impacts on the public at all. A number of consultees have raised equality issues relating to the proposed development which have not been addressed adequately or at all in the report, the appendix or in the EQIA. The equality duty is one which has to be "exercised in substance, with rigour, and with an open mind"ⁱ. It is not a question of "ticking boxes". The Borough Council appears to have simply failed to do this.

Conclusion

The County Council requests that the Queen Street report is deferred to enable you to consult ECC and correct the defects in the report. Should the item be considered on 27 January and should it result in a decision which Essex County Council considers to be unlawful then we see little alternative but to follow the process for judicial review.

In addition, I remind you that this is the County Council's formal objection to the proposal to appropriate the land which you are required by law to consider before appropriating. It was not possible for it to object before because we were unaware of the advertised appropriation.

I believe that you are well aware of the best number to use to contact me and I would be more than happy to discuss if that would be helpful.

Had we wanted to, we could have waited until after the Cabinet meeting to draw attention to the defects in the report. We have not done so because the County Council wishes to work in partnership with the Borough Council and give it the opportunity to work in partnership with the County Council.

I look forward to hearing from you. It is easiest to reach me on my mobile number at present, which is already in your possession.

Yours sincerely

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ⁱ R v Brent LBC ex parte Gunning (1985)

ⁱⁱ Bracking v Secretary of State for Work and Pensions [2013] EWCA Civ 1345