

**Agenda Item No:** 6.1 **Report No:** 30/16  
**Report Title:** New Homes Project Contractual Matters  
**Report To:** Cabinet **Date:** 17 February 2016  
**Cabinet Members:** Councillors Smith and Maskell  
**Ward(s) Affected:** All  
**Report By:** Gillian Marston, Director of Service Delivery  
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#### **Purpose of Report:**

To update Cabinet as to the contractual position relating to the New Homes Project with Karis Developments Limited and Southern Housing Group Limited and to determine whether, on the basis of the non-satisfaction of the title and ground conditions on key sites, the Conditional Sale Agreement and the Profit Share and Project Management Agreement should now be terminated.

#### **Officers Recommendation:**

- 1 To terminate the Conditional Sale Agreement and the Profit Share and Project Management Agreement dated 30 July 2015 which are in place between the Council, Karis Developments Limited and Southern Housing Group Limited in accordance with the provisions set out in paragraphs 3.4.3 and 4.3.3 of the Conditional Sale Agreement.

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#### **Reason for Recommendation**

- 1 The contractual arrangement entered into by the Council with Karis Developments Limited and Southern Housing Group Limited cannot continue as originally intended because of the non-satisfaction of the title and ground conditions on key sites, which became apparent during the course of due diligence. The Council therefore needs to re-evaluate its position and determine the way in which it wants to proceed. The position in which the parties now find themselves is one which was envisaged, at least as a possibility, by the Conditional Sale Agreement. In the current circumstances the Agreement permits any of the parties to serve notice on the others terminating both the Conditional Sale Agreement and the Profit Share and Project Management Agreement. The consequence of such termination is that each of the parties must walk away from the Agreements bearing their own costs to date.

## Information

- 2** The key purpose of the New Homes Project was to raise sufficient funds to allow the Council to build in excess of 150 Council homes across the district. In addition the project was to bring regenerative benefit to sites such as Robinson Road, Newhaven and potentially the Buckle, Seaford.
- 3** The intention was to gain residential planning permission on all sites and to sell the highest value sites to Southern Housing Group for 100% private market housing (Phase 1a sites) and to sell the smaller sites on the open market for 100% private market housing (Phase 2 sites). This would maximise the capital receipt and allow the Council to build out 100% affordable council homes on a third group of sites which the Council would retain (Phase 1b).
- 4** Prior to entering into binding Agreements the Council had prepared high level Reports on Title on each site and had shared these with the other parties. These identified the existence of covenants and other restrictions on sites, which in itself is not unusual. The parties were not prepared to undertake the work and expense of carrying out ground condition surveys and detailed title investigations, until such time as a binding agreement was in place.
- 5** Formal contracts were signed with Karis Developments Limited and Southern Housing Group Limited in July 2015. The contractual arrangements recognised that there was an amount of due diligence to be undertaken before the parties could properly work up and submit planning applications. The contractual arrangements therefore gave all parties a 5-month period from the date of signing, i.e. until 30 December 2015, to satisfy themselves as to the ground conditions of, and the title relating to, each individual site.
- 6** The contracts provide that Southern Housing Group Ltd will pay for ground condition survey reports for Phase 1a sites (including both the Buckle and Normansel Park Avenue), Karis Developments Ltd will do the same for the smaller Phase 2 sites (including those in Peacehaven), and the Council will do the same for the Phase 1b sites it will retain for Council housing (Robinson Road, Meeching Down, Hollycroft in East Chiltington). Each party was to share the ground condition survey reports it obtained, with each of the other parties.
- 7** Each party was to satisfy itself as to title at its absolute discretion.
- 8** The contract documents identify two particular sites – the Buckle and Normansel Park Avenue - as being “key” sites within the project. This is because they are the sites which would yield the highest capital receipts. Karis Developments Limited had always maintained that whilst the Project would remain financially viable if one or other of these sites failed for whatever reason (which might be ground condition failure, title failure, failure to secure a planning permission), the Project would not remain viable if BOTH of these sites failed.
- 9** The sites are packaged into two “Waves” within the contract documents, to reflect the two different planning authorities which will determine each bundle of planning applications. The first Wave to come forward (which includes the Buckle) is to be determined by the Council as planning authority; the second

Wave (which includes Normansel) is to be determined by the South Downs National Park Authority as planning authority.

- 10** The contract provides that in the event that the Buckle fails for whatever reason, any party can by notice terminate the project insofar as it relates to Wave 1; if Normansel fails any party can do the same for Wave 2; if both the Buckle AND Normansel fail then any party can by notice terminate the Agreements and thereby the whole project.
- 11** The Agreements imposed a duty on all parties to serve notice on their partners by no later than 30 December 2015 (the end of the 5-month due diligence period) stating whether or not they were satisfied as to the ground condition and title on each site.
- 12** As at that date the Council's investigations showed there to be title difficulties on the Buckle in that there is a covenant restricting building height and advice from two independent barristers, all of which advice was shared with the other parties, which concludes that the covenant is robust and likely to be uninsurable, which is unusual.
- 13** It is possible to seek to lift the covenant either through an application made to the Upper Tribunal (Lands Tribunal), formal appropriation of the site for planning purposes in accordance with local government legislation (which would require payment of compensation to those benefiting from the covenant) or negotiation with the beneficiaries of the covenant. This will take some time, involve the Council in unforeseen cost, (which cost the Council would want to share with the other parties to the Agreement), and independent legal advice suggests there is at best a 50% chance of lifting the covenant. There is no obligation under the contractual arrangement for either the Council or any other party to seek to remedy the title failure.
- 14** The Council's due diligence, backed by a barrister's report which has been shared with the other parties, show there to be similar difficulties with restrictions on the Normansel title. Whilst it is possible for the Council to seek to resolve these, this will take time, expense and there is no obligation on the Council to seek to do this.
- 15** In accordance with the requirements of the Conditional Sale Agreement, the Council served notice on Southern Housing Group Limited and Karis Developments Limited on 22 December 2015 stating that neither the title condition nor the ground condition were satisfied in relation to the Buckle or Normansel, i.e. the two key sites. That notice also set out the title and ground condition position on all other sites as at that date (see Appendix 1).
- 16** Service of these notices does not terminate the Agreements but does give the Council the right to serve further notices after 30 December 2015, the effect of which would be to terminate the Agreements.
- 17** Discussions have taken place with both parties. Southern Housing Group is in agreement with the Council's view on the current position, and understands and accepts that the work undertaken by it to date was at its own risk. It believes that the best course now is to terminate the current contractual arrangement.

- 18** Karis Developments Limited has proposed that the parties should vary the Agreements so that the parties continue without the sale and development of the two key sites and instead pursue the sale, with planning permission, of the smaller Phase 2 sites. This is a significant change, and will not allow the Council to receive the level of capital it expected to invest in Council homes.

### **Next Steps**

- 19** To achieve the maximum number of affordable homes, the Council needs to reconsider its options afresh.
- 20** Funds have been spent by the Council to progress this project, not least in relation to the Robinson Road site where work has been undertaken on designs for the site, following Council approval to commission both Helmsley Orrel (engineers), and Conran and Partners (architects), to undertake works to develop a viable scheme and planning application. Plans are underway to relocate the Council's existing waste depot operation from Robinson Road to a site on Avis Way in August 2017, making space for development.
- 21** Robinson Road continues to be an obvious site to progress in that it was always envisaged that development here would be funded mainly from the Council's own resources, supported by borrowing up to the level of the Housing Revenue Account debt cap (our 'borrowing headroom').
- 22** More work needs to be undertaken as the condition of the river wall has increased costs, and feedback from the consultation events indicate a preference for a mixed development of affordable and market homes to ensure mixed and sustainable communities. In addition, this will allow time to continue discussions with Lochin Marine and pursue again the original proposals to design a scheme around them so they can continue their operations until the end of the lease.
- 23** Finally, given the changing legislative landscape, the Council needs to think carefully what the impact of the Housing and Planning Bill may be, and as such, officers will report back on the most viable option for pursuing Robinson Road as quickly as possible.

### **Financial Appraisal**

- 24** Cabinet agreed to allocate a total of £1m as funding for preliminary costs associated with the development of sites included within this project. Examples of such costs are initial design fees, ground surveys, transport and environmental studies and public consultation.
- 25** Total expenditure incurred to date on the project (excluding costs associated with the initial award of the contract to the development partner) is £0.57m. As agreed by Cabinet, this expenditure is to be financed from a combination of General Fund Reserves and, where it relates to the planned development of new Council-owned homes, the Housing Revenue Account.
- 26** As noted above, officers will report back on the most viable option for pursuing the development of new affordable homes at Robinson Road. It was envisaged that access to grant funding from the Homes and Communities Agency (HCA)

would be available for this scheme if it was brought forward under the contractual arrangement with Karis Developments and Southern Homes Group. HCA funding is not expected to be available for the scheme outside a partnership arrangement.

### **Legal Implications**

- 27 The Legal department has contributed to the writing of this report and the legal implications are incorporated within the body of the report.

### **Risk Management Implications**

- 28 I have completed a risk assessment in accordance with the Council's Risk Management methodology and the legal and financial implications are included in this report. External legal has been sought and the approach contained in this report is considered robust. Any further risks need to be considered at the time of making the decision.

### **Equality Screening**

- 29 An Equality Impact Assessment would be necessary on a site by site basis if the project was to continue. The council is keen to continue to seek to build homes at Robinson Road and will complete an equality impact assessment should it do so and it would be anticipated that there will be a positive equality impact.

### **Background Papers**

Cabinet Report 29<sup>th</sup> September 2014, 'Lewes District Property Portfolio'

Cabinet Report 30<sup>th</sup> May 2012, 'Tender for Property Joint Partnership'

Website information at <http://www.lewes.gov.uk/newhomes/index.asp>

### **Appendix**

- 30 Appendix 1 - Title and ground condition position as set out in Notice served on Southern Housing Group Limited and Karis Developments Limited on 22 December 2015

## APPENDIX 1

Title and Ground Condition Position

<b>Site</b>	<b>Town</b>	<b>Phase</b>	<b>Wave</b>	<b>Title Condition</b>	<b>Ground Condition</b>
Christie Road	Lewes	Phase 1B	Wave 2	Satisfied - subject to possibly redefining access to site;	Not satisfied;
4 Fisher Street	Lewes	Phase 2	Wave 2	Satisfied providing we preserve access rights belonging to Lewes Town Council;	Not satisfied;
Ham Lane A	Lewes	Phase 2	Wave 2	Satisfied - subject to design accommodating rights for neighbour to connect to drainage channel and Dept of Transport to enter to inspect and maintain A27 drain;	Not satisfied;
Ham Lane B	Lewes	Phase 2	Wave 2	Satisfied - subject to design accommodating electricity wayleave;	Not satisfied;
Ham Lane C	Lewes	Phase 2	Wave 2	Satisfied - subject to design accommodating electricity wayleave and sufficient right of access for development;	Not satisfied;
Ham Lane D	Lewes	Phase 2	Wave 2	Satisfied - subject to Department of Transport rights in connection with bypass which oversails site and lease of part to ESCC (household waste site);	Not satisfied;
Juggs Road A & B	Lewes	Phase 2	Wave 2	Satisfied - subject to design accommodating Southern Water mains and pipe;	Not satisfied;
Juggs Road C	Lewes	Phase 2	Wave 2	Not satisfied;	Not satisfied;
Western Road	Lewes	Phase 1A	Wave 2	Not satisfied;	Not satisfied;

Site	Town	Phase	Wave	Title Condition	Ground Condition
Fort Rise A	Newhaven	Phase 2	Wave 1	Satisfied - subject to electricity cable rights access;	Not satisfied;
Fort Rise B	Newhaven	Phase 2	Wave 1	Not satisfied;	Not satisfied;
Fort Rise C	Newhaven	Phase 2	Wave 1	Not satisfied;	Not satisfied;
Fort Road	Newhaven	Phase 2	Wave 1	Not satisfied;	Not satisfied;
Meeching Down	Newhaven	Phase 1B	Wave 1	Satisfied;	Not satisfied;
New Road	Newhaven	Phase 2	Wave 1	Not satisfied - query over whether 1901 restrictive covenant applies);	Not satisfied;
Neill's Close	Newhaven	Phase 2	Wave 1	Satisfied - subject to SE Board cable access rights;	Not satisfied;
Robinson Road	Newhaven	Phase 1B	Wave 1	Satisfied;	Satisfied;
Valley View, Valley Road	Newhaven	Phase 2	Wave 1	Satisfied - subject to drainage rights (NB statutory open space s.123 advert necessary);	Not satisfied;
Western Road	Newhaven	Phase 2	Wave 1	Satisfied - subject to typical utility rights;	Not satisfied;
Alfriston Road	Seaford	Phase 1A	Wave 2	Satisfied - subject to possible need for approval of plans by Minister for Health;	Not satisfied;
Buckle Car Park	Seaford	Phase 1A	Wave 1	Not satisfied;	Not satisfied;
Normansel Park Avenue	Seaford	Phase 1A	Wave 2	Not satisfied;	Not satisfied;
Sovereign Close / Lexden Road (Part of Normansel Site)	Seaford	Phase 1A	Wave 2	Not satisfied;	Not satisfied;

<b>Site</b>	<b>Town</b>	<b>Phase</b>	<b>Wave</b>	<b>Title Condition</b>	<b>Ground Condition</b>
Ashington Gardens	Peacehaven	Phase 2	Wave 1	Satisfied - subject to possible drainage rights and electric cable mains along southern boundary;	Not satisfied;
Cliff Park Close	Peacehaven	Phase 2	Wave 1	Satisfied - subject to drainage rights;	Not satisfied;
Piddinghoe Avenue	Peacehaven	Phase 2	Wave 1	Satisfied - subject to drainage rights;	Not satisfied;
Roderick Avenue	Peacehaven	Phase 1A	Wave 1	Satisfied - subject to being able to obtain title indemnity insurance;	Not satisfied;
Steyning Avenue	Peacehaven	Phase 2	Wave 1	Not satisfied;	Not satisfied;
Valley Road	Peacehaven	Phase 2	Wave 1	Satisfied - subject to obtain title indemnity insurance and subject to drainage rights;	Not satisfied;
Wendale Drive / Telscombe Road	Peacehaven	Phase 2	Wave 1	Satisfied - subject to drainage rights;	Not satisfied;
Fairlight Ave / Esplanade	Telscombe Cliffs	Phase 2	Wave 1	Satisfied;	Not satisfied;
Hollycroft	East Chilmington	Phase 1B	Wave 2	Not satisfied;	Not satisfied;
Broyle Close	Ringmer	Phase 1B	Wave 2	Satisfied - subject to RTB services and access rights; electricity cable rights in favour of South Eastern Electricity Board; and the rights of access, drainage, and services referred to at items 1,2 and 3 of the charges register of the title;	Not satisfied;

<b>Site</b>	<b>Town</b>	<b>Phase</b>	<b>Wave</b>	<b>Title Condition</b>	<b>Ground Condition</b>
Broyleside Cottages	Ringmer	Phase 2	Wave 1	Satisfied - subject to RTB services and access rights; and wayleave for water pipes in favour of Mid-Sussex Water Company;	Not satisfied;
Deans Meadow	Barcombe	Phase 2	Wave 1	Not satisfied - property affected by covenants in conveyance dated 6 March 1911. A copy of the conveyance has not been located and the extent of the covenants cannot therefore be ascertained;	Not satisfied;
Southdowns	Plumpton	Phase 2	Wave 2	Satisfied - subject to RTB services and access rights and wayleave rights for electricity cables in favour of South Eastern Electricity Board and South Eastern Power Networks;	Not satisfied;
Leveller End	Newick	Phase 2	Wave 1	Satisfied - subject to RTB services and access rights; and foul and surface water drainage rights in favour of adjoining and neighbouring land;	Not satisfied;
L/A 4 Fair Place	Wivelsfield	Phase 2	Wave 1	Satisfied - subject to RTB services and access rights;	Not satisfied;
Green Park Corner	Wivelsfield	Phase 2	Wave 1	Not satisfied;	Not satisfied;